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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WASHINGTON MILLS ELECTRO MINERALS CORP., WASHINGTON MILLS CERAMIC CORP., JOHN T. WILLIAMS, AND PETER WILLIAMS,
Petitioners,

v.

DELONG EQUIPMENT CO.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a manufacturer may be held liable under the *per se* rule against resale price maintenance where there is no jury finding, or evidence, of an agreement with any distributor on the distributor's resale prices, but only an agreement on the wholesale prices the *manufacturer* would charge to other distributors.

2. Whether a terminated distributor's lost future profits (for 34 years) may be deemed antitrust injury flowing from a competitor's minimum resale price maintenance, even without proof of harm to market competition or of the terminated distributor's inability to compete by selling alternative brands.

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The court of appeals found a manufacturer liable to a terminated distributor based on the *per se* rule against minimum resale price maintenance under Section 1 of the Sherman Act, 15 U.S.C. § 1. The court applied that narrow rule even though there was neither a jury finding, nor proof, of any manufacturer-distributor agreement on the latter's *resale* prices, but only an agreement between the manufacturer and one distributor on the *wholesale* prices the *manufacturer* would charge to other distributors. The court also found that the terminated distributor's loss of future profits (for 34 years) was antitrust injury, without tracing that loss to the specific illegality (*higher* prices of the conspiring competitor distributor) and without requiring proof of anticompetitive effects, or even of

the plaintiff's inability to compete, in this concededly multi-brand, multi-purchaser market. Petitioners challenge those two rulings.[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 990 F.2d 1186. The district court's opinion on post-judgment motions (Pet. App. 41a-45a) is not reported. The court of appeals' opinion at the summary-judgment stage (Pet. App. 48a-87a) is reported at 887 F.2d 1499.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1993. Pet. App. 1a. A timely petition for rehearing was denied on August 3, 1993. Pet. App. 88a-89a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

A. Factual Background

This case involves a product, called "media," sold to industrial companies for use in polishing metal parts like jet engine blades. The particular type of media at issue is "preformed ceramic media," which is cut from ceramic-based material into various shapes for various uses. Washington Mills, long in the media business, began manufacturing preformed ceramic media in the early 1980s. There are few barriers to entry into this low-technology manufacturing business, and the relevant market always contained competing brands and many purchasers. *See* Pet. App. 14a; Tr. 1930-31 (plaintiff's expert), 1683-86 (plaintiff's sales manager). Washington

[1] Petitioners are two wholly owned subsidiaries of the Washington Mills Company, a Delaware corporation, and two key corporate officers—whom we refer to collectively as "Washington Mills." Neither corporate petitioner has subsidiaries except wholly owned ones. *See* Sup. Ct. R. 29.1.

Mills had no market power so as to injure competition in this market. Pet. App. 2a, 59a-60a.[2]

Washington Mills often sold its product to distributors rather than directly to industrial end-users. In New England, its principal distributor was BCS Company, an expert in the media business, which also acted as distributor for many other manufacturers. Pet. App. 4a. In the early 1980s, BCS undertook extensive development and testing to identify the proper media for polishing new jet engine blades then being developed by Pratt & Whitney in Connecticut. BCS tested many products and submitted the names of several manufacturers' media. Near the end of 1982, Pratt selected three Washington Mills media products, which Pratt designated with "product material control" numbers (PMC 3175, 3178, 3179). For a time, Washington Mills was the only source of the required media approved by Pratt. *Id.* at 5a.

During most of 1983, while Pratt was developing the engine blades in Connecticut, Washington Mills sold the media to BCS at 49.5 cents per pound (representing a 25% distributor discount off the list price of 66 cents). BCS in turn resold it to Pratt at 97 or 91 cents per pound. At that stage, BCS bought unmarked boxes of generic media from Washington Mills and itself affixed not only the required Pratt designations but also its own (BCS) label. Eventually, Washington Mills called the Pratt-destined media "special" and assigned its own special names (P&W 5000, 6000, 7000). Pet. App. 7a-8a.

Respondent DeLong Equipment Company, based in Georgia, was also a distributor of several manufacturers' media, including that of Washington Mills (since 1981). By early 1983, DeLong had begun expressing interest in selling media to Pratt in competition with BCS. Washington Mills and BCS responded by refusing to tell De-

[2] The facts recited reflect the evidence at trial and supportable inferences against Washington Mills (which presented contrary evidence at trial on many critical issues).

Long the specifications for the three products required by Pratt, and DeLong was accordingly unable to bid on Pratt business until November 1983.

By mid-1983, it became clear that Pratt would soon start manufacturing its new engine blades in Georgia and that BCS (from Connecticut) could not meet the 24-hour delivery schedule set by Pratt. BCS thus could not be a regular distributor for the Georgia plant, despite its having developed the Pratt media account. In August 1983, BCS proposed to DeLong that they undertake a joint venture to serve Pratt, explaining that there was "plenty of money in it" for both dealers. DeLong refused, wanting the business for itself. Pet. App. 6a-7a.

It was at this point, according to the court of appeals, that the Section 1 conspiracy began. Pet. App. 7a-8a. In early November 1983, at about the same time that it approved DeLong as a supplier, Pratt requested bids for its first production contract for the Georgia plant. Washington Mills thereupon set a new wholesale price (for DeLong) of 85 cents per pound, up from the 49.5 cents previously charged BCS. Pet. App. 8a. This new price was set in agreement with BCS, with Washington Mills also agreeing to make payments to BCS on each sale of media destined for Pratt. The payments would be 15% of the 85-cent wholesale price on sales to DeLong and 35.5 cents per pound on media sold to BCS itself—the latter figure calculated to render the net wholesale price to BCS (85 cents minus 35.5 cents) identical to the original wholesale price of 49.5 cents. *Id.* at 9a.[3]

Although DeLong received the Pratt contract for the Georgia plant in November 1983, Pratt bought most of its media in 1984 from BCS. Toward the end of 1984, Pratt began buying some of its media directly from

[3] BCS entered into a one-year contract with Pratt in October 1983, before DeLong was approved as a supplier to Pratt. BCS sold Pratt a good deal of media under that contract (until late 1984). BCS paid 49.5 cents per pound for that media.

Washington Mills. Pet. App. 10a. Washington Mills charged Pratt 75 cents per pound, which became the new wholesale price charged to DeLong as well (down from 85 cents). BCS also received commissions (or, as DeLong called them, "kickbacks") on these direct sales. BCS advised Washington Mills that, because of the time needed for Pratt to approve other products, the "special" higher price on Pratt-destined media could be maintained "for at least 3 years unless DeLong does not play the game." *Id.* at 16a.

From the time it first targeted the Pratt business, DeLong not only had been warning Washington Mills against any price discrimination against it, but had been questioning Washington Mills's designation of the Pratt media as "special." DeLong thought it should pay only 49.5 cents per pound, the price of Washington Mills's generic media, on the repeatedly asserted ground that the generic media was the same as the media sold to Pratt. Washington Mills rebuffed DeLong, advising DeLong, falsely, that the Pratt media was not the same as the generic.[4]

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[4] Washington Mills offered various cost- or risk-based reasons for its special pricing of the media sold to Pratt, which Pratt required to be specially labelled (as meeting Pratt's needs), over and above the evident desire to seize the opportunity of temporarily being the sole approved source for this one industrial end-user. But the case is presented in this Court on the assumption that such reasons were legitimately rejected by the jury and, in particular, that Washington Mills's representation to DeLong was false.

Although the Eleventh Circuit asserted that "Pratt . . . was duped" (Pet. App. 6a), Pratt never accused Washington Mills of fraud. Indeed, after an internal investigation, Pratt disclaimed having been "duped" into paying too high a price for what was for a time the sole approved source of media meeting its special needs for the polishing of jet-engine blades. Pl. Exh. 1108 (regarding allegations of *DeLong* case: "we did not pay excessive price in the case of the *DeLong* mass finishing media"; "[i]t is understandable and regular business practice that a distributor pursues a vested interest in both being helpful and in concealing the manufacturer source, to avoid losing a sale and markup").

Washington Mills terminated DeLong as a dealer in August 1985 (by which time, as noted, BCS was no longer selling to Pratt, though Washington Mills itself was). The aim of the termination, according to DeLong's evidence, was to prevent DeLong from disturbing Pratt's belief that the Washington Mills media it was buying was "special." In the next several years, Pratt approved various other manufacturers' products and began buying from several sources (most often, directly from manufacturers), and prices to Pratt dropped. Tr. 543, 553, 1763-64.

B. Pre-Trial Proceedings

Six months after its termination, DeLong brought this action. DeLong alleged that Washington Mills engaged in price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. § 13(a), by charging DeLong 85 cents while charging BCS only 49.5 cents (the net price after the commissions). DeLong also alleged that Washington Mills engaged in fraudulent misrepresentation, a tort under Georgia law, in telling DeLong that the media at issue was "special." Washington Mills has been held liable on those claims and does not contest that liability, which is not at issue here. What is at issue is DeLong's claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, seeking treble damages, in the form of 34 years of lost future profits, for its termination as a distributor of Washington Mills media.[5]

The key issue for Section 1 liability in this case was whether DeLong could prove a *per se* violation, because it conceded that there were no demonstrable market effects to support a rule-of-reason claim. Pet. App. 2a, 59a-60a. DeLong tried to meet that burden in two alternating ways.

[5] DeLong also made claims under Section 2 of the Sherman Act and Section 3 of the Clayton Act, 15 U.S.C. §§ 2, 14, but judgment was granted to Washington Mills on those claims, and DeLong did not appeal. Pet. App. 56a n.6. DeLong's claims against BCS and certain of its officials, and certain other claims made by DeLong, are likewise not at issue. *See* Pet. App. 50a n.3.

At times, it claimed resale price maintenance, which remains a *per se* violation, but presented a problem of proof in this case. At other times, DeLong claimed only an agreement on the manufacturer's wholesale prices, which could be proved here, but presented a problem of law (it is not *per se* illegal).

In the first round of proceedings, the district court rejected DeLong's claim of *per se* liability and granted summary judgment. The Eleventh Circuit, however, reversed. Pet. App. 56a-78a. The court of appeals noted DeLong's concession that the agreement at issue is a vertical one (*id.* at 56a) and that, because a rule-of-reason case requires proof that the conduct "had a significant anticompetitive effect in a defined product market," DeLong "has not alleged and cannot prove the facts required to establish a prima facie rule of reason case." *Id.* at 59a, 60a; *see id.* at 60a n.10 (DeLong made no showing of market power on the part of Washington Mills). The court concluded, therefore, that DeLong's Section 1 claim must fail unless it comes under the *per se* rule against "vertical price restraints," which, at least at the outset, the court recognized as requiring "an agreement to maintain *resale* prices." Pet. App. 57a (emphasis added). The court then held that DeLong had pointed to sufficient evidence to support an inference that Washington Mills and BCS had such an agreement and that DeLong was terminated as a result of the agreement, thus allowing the case to go to trial.

The court specifically pointed to evidence of a Washington Mills-BCS agreement to represent generic stock media as "special" (Pet. App. 64a-66a) and to evidence "of joint action between Washington Mills and BCS in regard to media sales to Pratt" (*id.* at 67a), or "with respect to the Pratt account" (*ibid.*). The court then said that, in light of BCS's close contacts at Pratt, a jury could infer that "Washington Mills and BCS had agreed to 'pad' *the price of* the Pratt media." *Id.* at 68a (emphasis added). The court did not specify, however, whether it

meant, or why a jury could infer, an agreement to pad the *resale* price charged by *BCS* to Pratt rather than the *wholesale* price charged by *Washington Mills* to DeLong, BCS, or any other distributors. The court compounded this crucial ambiguity in its repeated references to "price" when it pointed to the "commissions" paid by Washington Mills to BCS, which the court said were "linked to the *sale price of media to Pratt*," so that a jury could draw "a reasonable inference that the 'commissions' were a means for BCS to share in the 'pad' by which the *price* was inflated" (*id.* at 70a (emphasis added)). *See also ibid.* ("the 'commissions' paid by Washington Mills based on a percentage of the price of media sold to Pratt"). Apparently under the misimpression that the commission amounts were based on *resale* prices—in fact, as described above, the amounts were concededly based only on Washington Mills's wholesale prices, thus eliminating any basis for the Eleventh Circuit's suggestion of an incentive to agree to resale prices in order to fulfill the agreement to pay BCS—the Eleventh Circuit concluded that a jury could infer an agreement on resale prices. *See, e.g., id.* at 76a.

Washington Mills petitioned for certiorari on the ground that the *per se* rule against resale price maintenance could not apply here, since there was no agreement to fix resale prices. 89-1362 Pet. i. DeLong responded, among other things, that review by this Court was premature, since the "case may yet be resolved below on factual grounds, in that no trial on the merits has been held." 89-1362 Br. in Opp. 23.[6] This Court denied certiorari. 494 U.S. 1081 (1990).

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[6] DeLong also argued in the alternative that "resale price maintenance is not a necessary element of a *per se* [vertical] price conspiracy" (89-1362 Br. in Opp. 12, 12-21) and that a resale-price agreement could be inferred, on the theory that "the wholesale price was raised above the previous resale price of identical product, thereby forcing up the resale price level" (*id.* at 12). *See id.* at 9 ("The Eleventh Circuit recognized that when a manufacturer and

C. The Case Presented to the Jury

Despite the Eleventh Circuit's apparent belief that this case could be fit into the mold of resale price maintenance, DeLong recognized the impossibility of any such attempt when the case returned to the district court for trial. Thus, BCS's principal officer testified without contradiction that there was never any agreement with Washington Mills concerning BCS's resale prices to Pratt or other end-users. Tr. 1452-53. DeLong's principal officer testified that Washington Mills never attempted to control DeLong's resale prices. Tr. 304. DeLong's sales manager testified to the same. Tr. 1631, 1633. DeLong's expert likewise testified that he found no indication that Washington Mills ever maintained resale prices by specifying any distributor resale price or markup. Tr. 1946-47. And the undisputed evidence—displayed in a chart showing all relevant media sales and resales, attached to DeLong's Responsive Brief in the Eleventh Circuit as Appendix 1—unmistakably shows that the commissions paid by Washington Mills to BCS were calculated only by reference to the Washington Mills price, *not* by reference to any resale price, thus undermining the Eleventh Circuit's apparent belief that the commissions could prove the link to resale prices.

Accordingly, DeLong's claim at trial was that Washington Mills agreed with BCS, not on BCS's resale prices, but on a higher *wholesale* price Washington Mills was to charge DeLong and other distributors, with the aim and effect of increasing DeLong's resale price to Pratt so as "to enforce a product misrepresentation." Tr. 1947-48 (DeLong's expert, Dr. Seaman). DeLong argued to the jury, in its closing, that the illegal agreement "in this case

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a distributor conspire to fix a wholesale price (85 cents per pound for media labeled 'special') substantially higher than the previous resale price (66 cents per pound for identical stock media), it *necessarily* sets the resale price at which the product can be sold.") (emphasis added).

was to fix the *price to DeLong Equipment Company* at 85 cents" (Tr. 2325) (emphasis added). *Id.* at 2326 ("there was a fix here of a *price to DeLong*") (emphasis added); *id.* at 2363 ("This case is about Washington Mills agreeing with one of its distributors what price it's going to charge another distributor, DeLong Equipment Company."); *id.* at 2364 ("One distributor and the manufacturer got together and decided what another distributor was going to pay.").[7] No argument was made that Washington Mills and BCS had an agreement fixing BCS's resale prices.

The jury charge on the Section 1 claim (reprinted at Pet. App. 90a-98a), with DeLong's approval, reflected this understanding that the case does not involve any resale price agreement. The instructions' very definition of DeLong's claim was that Washington Mills and BCS agreed "to fix the price of preformed ceramic tumbling media which was sold to DeLong." Pet. App. 90a. *See id.* at 95a (issue was "whether or not a conspiracy existed as alleged by DeLong to fix the price of media sold to DeLong"); *id.* at 95a-96a (repeating "fix the price of media sold to DeLong" three more times). Likewise, the instructions defining the elements of the alleged price fixing made no mention whatever of any agreement on resale prices. Pet. App. 91a-98a. Rather, those instructions were drawn, with easily identifiable redactions and changes, from a leading treatise's model charges on *horizontal* price fixing (3 L. Sand *et al., Modern Federal Jury Instructions* ¶ 79.02 (1989)); conspicuously, no use was made of the model charges on resale price maintenance set forth in the immediately succeeding chapter of that

[7] *See also id.* at 2366 ("the underlying essential issue in this case is that there was a fraud perpetrated in our view by Washington Mills on DeLong, on Pratt, and in order to support that fraud, they had to charge and, in fact, agreed with BCS to charge 85 cents to Harold DeLong, knowing that when he put even a minimum markup on the product, it was going to come in exactly where BCS had been charging up in New England.").

treatise (*id.* ¶ 79.03). Accordingly, the jury was asked simply to determine, if it found a conspiracy between Washington Mills and BCS, "whether the purpose or predictable effect of the agreement was to fix the price of media sold to DeLong." Pet. App. 96a.

That DeLong's case no longer included a claim of a resale price agreement not only is apparent from the jury charge but was expressly acknowledged on the record of the charging conference. When Washington Mills's counsel asked the trial judge if the requested instruction on resale price agreements was to be given, the judge responded:

> I don't think that's involved here. I don't think that —I don't think that's the gist of their case. If they don't prove it the way they've laid it, then that's it. I don't think resale price is the issue. That's the reason I've had such a hard time getting the—the price discrimination hasn't been a bother. It's pretty well set, it either is or it isn't under that rebate-commission policy, but the conspiracy, because I have—I can't find a case that deals with one like it.

Tr. 2319. Counsel for Washington Mills said: "There ain't none." *Ibid.* And counsel for DeLong agreed: "There's not, Judge." *Ibid.*

With no charge on resale price maintenance, the jury returned a verdict of liability for price fixing under Section 1 of the Sherman Act. Based on projected lost earnings for 34 years following DeLong's termination in 1985 (Pet. App. 32a, 42a), the jury awarded damages of $2,033,295—trebled on entry of judgment to $6,099,885 (*id.* at 47a). The district court subsequently granted a new trial on the issue of damages, finding "that the assumptions utilized by the experts [for DeLong] in arriving at their conclusions were speculative and, in some cases, directly contrary to undisputed evidence in the case." Pet. App. 42a. In particular, the court observed that Pratt had always planned to introduce multiple sources of

media, was by the time of trial using four different manufacturers' products (with more under study), and had always planned to buy directly from manufacturers wherever possible. *Id.* at 43a.

D. The Court of Appeals Decision

On appeal, the Eleventh Circuit affirmed liability and reinstated the award of $6 million for 34 years of future lost profits. Pet. App. 1a-40a. The court recognized in its opening paragraph that liability turned on whether a "conspiracy between [a] manufacturer and [a] favored distributor," as found by the jury here, where "the object of the conspiracy was to raise wholesale prices to other distributors," violated the *per se* rule against vertical "[r]esale price maintenance agreements." *Id.* at 2a. The court held that the *per se* rule applied. *Id.* at 13a-28a.

The court began by finding sufficient evidence of an agreement, or conspiracy, between Washington Mills and BCS. Pet. App. 13a-16a. But because the existence of agreements between a manufacturer and distributor itself presents no antitrust problem (indeed, is inevitable), the court had to proceed to the essential question of *what* the manufacturer and distributor agreed to—in particular, whether they agreed on the distributor's (BCS's) *resale* prices, as forbidden by the *per se* rule. The critical pages of the court's opinion, therefore, are the three pages explaining why the court of appeals found not only a Washington Mills-BCS agreement over Washington Mills's wholesale price to DeLong (shown in the "conspiracy" portion of the opinion, *id.* at 13a-16a), but an agreement between Washington Mills and BCS as to BCS's resale prices (*id.* at 23a-27a).

In those central pages, the court made no reference whatever to the absence of any jury finding or instruction on resale price agreements. Rather, the court discussed why it thought resale price maintenance *could* have been found. Thus, the court pointed to the evidence of Wash-

ington Mills's agreement with BCS to charge an 85-cent wholesale price to DeLong and then explained its leap from wholesale prices to resale prices as follows:

> By fixing the wholesale price level at 85 cents, DeLong or any other distributor would have been required to sell to Pratt at the wholesale price plus expenses and market profits, so that what would result would be the equivalent of resale price maintenance. Price-fixing at the wholesale level, as testified to by a DeLong expert economist, was the mechanism by which the retail price was maintained.

Pet. App. 24a. Notably, this rationale—forcing higher resale prices by raising wholesale prices—focused only on *DeLong*'s resale prices; it could not apply to *BCS*'s prices, because, by the court of appeals' specific finding, the effective wholesale price to BCS was not raised, but was retained at the low 49.5 cent level. *See also* note 6, *supra* (DeLong's theory same).

The court recognized that Professors Areeda and Hovenkamp had specifically criticized the earlier panel's similar transmutation of wholesale-price agreements into resale-price agreements. *Id.* at 25a-27a (quoting and discussing P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1622′ at 1049 (Supp. 1991)). The court responded by relying on Professor Areeda's observation, elsewhere in his treatise, that a maximum resale-price agreement could be inferred where a manufacturer varies its wholesale price as a *function* of particular distributors' resale prices, *i.e.*, raising the wholesale price to offset any profit a distributor might seek by increasing its resale price. *Id.* at 25a. The court thought that observation apt even though, in this case, involving a claim of minimum resale price maintenance, the wholesale prices did not vary depending on particular distributors' resale prices.

In addition to finding a violation of the *per se* rule against resale price maintenance, the Eleventh Circuit concluded that DeLong's future lost profits constituted

antitrust injury flowing from "that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (internal quotation marks omitted). *See* Pet. App. 20a-23a. The court held that DeLong's alleged 34 years of future inability to compete could be traced to its termination as a supplier of the Washington Mills brand. *Id.* at 20a-21a. As to DeLong's inability to compete, the court pointed to evidence of a three-year period during which Washington Mills was Pratt's sole source for media (*id.* at 23a): the court did not look beyond Pratt to other purchasers, deny the evidence of alternative media brands, repudiate its own recognition that Washington Mills lacked market power (*id.* at 2a, 60a & n.10), or identify harm to competition in the market as a whole. The court explained how the "loss of opportunity to compete" (*id.* at 22a) constituted antitrust injury (with no reference to how the loss flowed from the allegedly fixed higher resale prices or had anticompetitive effects):

> Washington Mills, at BCS's instigation and with BCS's assistance, unfairly took advantage of its short-term position as the only approved source of media by artificially inflating the wholesale price and thereby extracting super-competitive profits which it shared with BCS by payment of "commissions" or "kickbacks"; that it blocked competition among distributors of its generic media in the market for one of its largest end-customers; and that it terminated DeLong as a Washington Mills distributor when DeLong threatened not to "play the game." Thus, DeLong has sustained antitrust injury by loss of its Washington Mills distributorship and consequent loss of sales and profits.

Pet. App. 22a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit in this case awarded more than $6 million in damages under Section 1 of the Sherman Act for conduct that, by the plaintiff's own concession, could not actually have impaired competition. *See* Pet. App. 2a, 59a-60a & n.10. The court did so (a) by adopting a radically new and patently erroneous view of the surviving *per se* rule against minimum resale price maintenance and (b) by finding antitrust injury without tying the claimed damages to the specific alleged illegality—a competitor's higher resale prices—and without requiring proof of harm to market competition or, indeed, of even the *plaintiff*'s inability to compete in the multi-brand, multi-purchaser market. Both errors raise important issues and warrant correction by this Court.

The Eleventh Circuit rested Section 1 liability entirely on the *per se* rule barring minimum resale price maintenance, adopted by this Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). This holding rested on two flagrant mistakes. First, the court found resale price maintenance without any jury finding (or request for a finding) of a manufacturer-distributor agreement to fix the distributor's resale prices, the essential element of a *Dr. Miles* violation. The absence of such a finding, reflecting a deliberate choice by DeLong about its "price fixing" claim, warrants summary reversal. *Cf. Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (summary reversal in clear antitrust case). Second, the Eleventh Circuit found resale price maintenance without proof of the required agreement on resale prices, based only on a manufacturer-distributor agreement on the *manufacturer*'s *wholesale* prices to others. In this respect, as with the absence of an essential finding, the court of appeals committed blatant error and departed from the law of other circuits. The result represents an unprecedented and wholly unjustified creation of new *per se* vertical liability, achieved through an expansion of the

per se rule of *Dr. Miles,* a rule that this Court has several times taken pains to *circumscribe* so as not to condemn conduct that (in this case and generally) presents no threat to competition. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

The Eleventh Circuit also committed at least two important errors in finding antitrust injury based on DeLong's future profits allegedly lost as a result of its termination. First, the court did not, because it could not, tie this injury to the specific cause of illegality—the supposedly agreed-to higher resale prices of the conspiring distributor (BCS). This Court has made clear that a competitor "may not complain of conspiracies that . . . set minimum prices" (*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 n.8 (1986); *id.* at 583); the *Dr. Miles* rule protects only the agreeing distributor's (here, BCS's) pricing freedom, but DeLong claims injury to its interest in a continuing distributorship, which is not subject to *per se* protection (*Business Elecs., supra; Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977)). Second, and in any event, the Eleventh Circuit failed to require proof that the termination itself, even if *per se* illegal, had anticompetitive effects, as expressly demanded by *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990) (holding that competitor cannot sue for *maximum* resale price maintenance absent predatory pricing). DeLong concedes that it cannot show such market effects; and the Eleventh Circuit ignored the fact that even *DeLong* was able to compete in this multi-brand, multi-purchaser market through alternative brands—from the very outset in the market as a whole; after three years (not 34), for Pratt itself. In this respect, as with the failure to tie the injury to the specific illegality, the court of appeals' ruling on antitrust injury conflicts with decisions of other circuits and expands antitrust liability where this Court has taken pains to circumscribe it.

I. THE COURT OF APPEALS INCORRECTLY FOUND *PER SE* LIABILITY FOR RESALE PRICE MAINTENANCE WHERE THERE WAS NO JURY FINDING, AND NO EVIDENCE, OF A MANUFACTURER-DISTRIBUTOR AGREEMENT ON THE DISTRIBUTOR'S RESALE PRICES.

The court of appeals in this case rested liability solely on the *per se* rule against resale price maintenance—the only type of vertical agreement still subject to condemnation under Section 1 without proof of market power or anticompetitive effects (which DeLong could not show).[8] But the case cannot conceivably be a resale price maintenance case, *first*, because there is no *finding* of a resale price agreement (the issue never having been presented to the jury) and, *second*, because there is no *proof* showing or implying any such agreement. The Eleventh Circuit decision thus expands *per se* liability, without justification, to an entirely new category of manufacturer-distributor agreements whose "object . . . [is] to raise wholesale prices to other distributors." Pet. App. 2a. The result conflicts with this Court's and other circuits' decisions.

A. There Is No Jury Finding of a Resale Price Agreement.

The first and sufficient reason that there cannot be liability for resale price maintenance here is that there was no jury finding, or instruction, on the essential, defining element of such a violation—an agreement between the conspiring manufacturer and distributor on the resale prices to be charged by the distributor. The jury in this

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[8] *See, e.g., Business Elecs.*, 485 U.S. at 724, 735-36 (referring to "resale prices," Court says: "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels"); E. Gellhorn, *Antitrust Law and Economics* 278-333 (3d ed. 1986); 7 P. Areeda, *Antitrust Law* ¶ 1437 at 3-6 (1986). We note that tying arrangements, though vertical and treated under a "*per se* rule," are condemned only upon a showing of market power. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072, 2079-81 (1992).

case was asked to find only an agreement between the manufacturer (Washington Mills) and distributor (BCS) over the *wholesale* prices that Washington Mills would charge a competing distributor (DeLong). *See* pages 9-11, *supra*. Such an agreement is not the same as an agreement on the conspiring distributor's (BCS's) resale prices. And even if a wholesale-price agreement *could* form part of the basis for inferring a resale-price agreement in a particular case, the drawing of any such inference, which the Eleventh Circuit itself recognized to be appropriate only in narrow circumstances (Pet. App. 25a-27a), is a task for the jury. The jury in this case was not asked to draw, and did not draw, any such inference.

The need for proper jury instructions and findings on each essential factual element of liability, though hardly unique to antitrust cases, is particularly important for the rule against resale price maintenance. This Court adopted a heightened standard for finding such an agreement in *Monsanto*, and carefully narrowed the circumstances permitting inference of such an agreement in *Business Electronics*, precisely because it is critical, yet often difficult, for the finder of fact to distinguish between unlawful manufacturer-distributor agreements (over the distributor's resale prices) and lawful manufacturer-distributor agreements, such as agreements to terminate a price-cutting competing distributor (absent market effects). *Business Elecs.*, 485 U.S. at 723-28; *Monsanto*, 465 U.S. at 762-64. The importance and difficulty of the issue reinforce the need for careful instructions and explicit findings to ensure a proper basis for *per se* liability. Thus, the Fifth Circuit expressly held in *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 780 F.2d 1212 (1986), *aff'd*, 485 U.S. 717 (1988), that a jury must be required to find an agreement by the conspiring distributor to set its resale prices before *per se* liability for resale price maintenance may be found. *Id.* at 1215, 1216, 1218. The Eleventh Circuit ruling conflicts with that decision.

The absence of such an instruction and finding in this case warrants more than a new trial; it warrants outright reversal and judgment against DeLong. The presentation of the Section 1 case to the jury without any charge on resale price maintenance, and without any description of DeLong's case as involving a claim that Washington Mills and BCS agreed on BCS's resale prices, reflected a deliberate strategic choice by DeLong about what it could prove (and sustain on appeal). Thus, when the district judge at the charging conference declined to give the instruction requested by Washington Mills on resale price maintenance, saying that the case did not involve resale price maintenance, DeLong's counsel agreed. *See* page 11, *supra*. That agreement comported with DeLong's view, expressed repeatedly in this case, that *per se* liability may be sustained without showing resale price maintenance; as DeLong said to this Court in opposing certiorari in 1989, "resale price maintenance is not a necessary element of a *per se* price conspiracy" (89-1362 Br. in Opp. 12).[9] Having persuaded the district court to present its case on that theory (which is indefensible and was not openly adopted by the Eleventh Circuit), DeLong is in no position now to seek a second chance to try its case on a different theory.

B. There Is No Basis for *Per Se* Liability.

The second reason that there cannot be resale price maintenance here is that proof of the essential element is lacking. As demonstrated by the jury charge given by

[9] DeLong often repeated that view, relying on its interpretation of the Eleventh Circuit's 1989 decision in this case as well as this Court's use of the expression "vertical price fixing." *See, e.g.*, Plaintiff's Trial Brief Concerning Vertical Price Fixing at 13 ("DeLong's Sherman Act claims are viable even without evidence of an illegal conspiracy to fix resale prices."); Plaintiff's Brief in Opposition to Motion for JNOV at 16 ("[r]esale price maintenance is not a necessary element of a *per se* price conspiracy"); Responsive Brief of Appellant-Cross Appellee at 41 ("under the law of this case, proof of resale price fixing was not required").

the court and agreed to by DeLong, DeLong's closing argument, and the uncontradicted testimony denying any resale price agreement, there is no evidence whatever that the conspiring manufacturer (Washington Mills) and distributor (BCS) agreed on the distributor's (BCS's) resale prices, and hence no basis for liability under *Dr. Miles*. Rather, the evidence establishes no more than an agreement between the manufacturer and distributor on the manufacturer's wholesale prices to other distributors.

The Eleventh Circuit nevertheless held that *Dr. Miles* applied because, in its view, this agreement about wholesale prices was a device to raise resale prices. The court's theory, following DeLong's argument (*see* note 6, *supra*), was simply that Washington Mills's raising of the wholesale price to DeLong had the aim and inevitable effect of forcing DeLong to raise its resale prices. *See* page 3, *supra*. But that theory is a patently insufficient basis for inferring the required agreement on resale prices.

First, the theory by its terms cannot apply to BCS, because the wholesale prices Washington Mills charged to BCS were *not* raised (which was the basis of Washington Mills's liability for price discrimination). But, under the very definition of resale price maintenance, it is only the resale prices of *BCS*—the agreeing distributor—that count. DeLong's resale prices are irrelevant, because DeLong, as it has vigorously insisted, never agreed on its resale prices with Washington Mills or any other supplier, whether voluntarily or otherwise. (Washington Mills and BCS could *attempt* to affect DeLong's resale prices, but *Dr. Miles* requires an actual agreement, as stressed in *Monsanto*, and there can be no agreement on DeLong's prices unless DeLong is a party to it.) Thus, the Eleventh Circuit's rationale for inferring a resale price agreement does not apply to the only party whose agreement could form the basis for a *Dr. Miles* violation.

Second, and in any event, this Court has held that neither an aim to raise resale prices nor an inevitable effect of raising resale prices, nor the aim and effect in combination, can suffice to show resale price maintenance. In *Monsanto*, 465 U.S. at 762-63, and *Business Electronics*, 485 U.S. at 728, the Court specifically explained that the same aim and inevitable effect are present with many kinds of manufacturer-distributor agreements that are not subject to any *per se* rule, much less to the *Dr. Miles* rule. For example, an exclusive distributorship agreement may be adopted with the intent of conferring enough protection against intrabrand competition on a particular distributor to enable it to fund consumer services desired by the manufacturer and in that event will have the intrinsic purpose and result of raising the resale prices on that brand. Yet such an agreement is not subject to *per se*-illegality, as *Business Electronics* held, even when it results from a specific manufacturer-distributor agreement to terminate a price-cutter. An intended effect on resale prices is not sufficient to prove a "meeting of minds" agreeing on resale prices. *Monsanto*, 465 U.S. at 764; *see Carlson Mach. Tools, Inc. v. American Tool, Inc.*, 678 F.2d 1253, 1261 (5th Cir. 1982).

There is nothing more in this case from which an inference of such an agreement could be drawn. The Eleventh Circuit drew an analogy to maximum resale price maintenance effected by a manufacturer through distributor-specific raising of wholesale prices to match any resale-price increases by the distributor (thus taking the profit out of such increases). Pet. App. 25a. But there is no such arrangement in this case: the wholesale prices here did not depend on (particular distributors') resale prices. The distributors in this case thus suffered no impairment of the sole right protected by *Dr. Miles*: to profit as they can, given their costs, by setting their resale prices as they wish.

The Eleventh Circuit also thought that the payments made by Washington Mills to BCS were significant, but the court did not explain, and could not explain, how those payments could support the necessary inference of an agreement on BCS's *resale* prices. Contrary to the apparent misunderstanding of the 1989 court of appeals panel (Pet. App. 70a), those payments were in no way linked to any resale prices charged to Pratt: they depended solely on the wholesale price charged DeLong (15 percent), the wholesale price charged BCS (35.5 cents, in order to maintain the original price of 49.5 cents), or Washington Mills's own price on direct sales to Pratt (where no reselling was present). BCS earned its commissions, and Washington Mills earned its profits, regardless of any resale price. Accordingly, however improper the commissions (whether as a tool of price discrimination or a state-law tort), they lend no support to an inference of resale price maintenance.[10] The Eleventh Circuit allowed its condemnation of the conduct to blind it to the requirements of the antitrust violation alleged.[11]

The Eleventh Circuit thus dramatically departed from the requirements of the *Dr. Miles* rule and, in all but name, created a new rule of *per se* liability for manufacturer-distributor agreements setting the manufacturer's wholesale prices. Indeed, the court's introductory statement of its holding condemns a manufacturer-distributor agreement as *per se* illegal where "the object of the conspiracy was to raise wholesale prices to other distribu-

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[10] Even the fact that the commissions were paid (at BCS's request) to a BCS affiliate in the Bahamas, and not reported on IRS Form 1099, *see* Pet. App. 7a, warrants an inference of no more than an intent to hide price discrimination or some other tort.

[11] As this Court reiterated only last Term, the antitrust laws do not provide a remedy simply because business conduct is improper, unfair, tortious, or even malicious. *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2588-89 (1993); *see Hunt v. Crumboch*, 325 U.S. 821, 826 (1945).

tors." Pet. App. 2a. No other circuit, as far as we are aware, has applied a *per se* rule in circumstances like these; several circuits have rejected *per se* liability based on agreements as to wholesale prices in related circumstances;[12] and there is apparently uniform recognition that liability for vertical agreements is limited to resale price maintenance. *See* 8 P. Areeda, *Antitrust Law* 260 (1989) ("[A]s a matter of definition, all antitrust rules condemning vertical price fixing categorically apply only to *resale* price fixing, not to all vertical contracts setting prices."); U.S. Br. in *Business Electronics* at 11 ("The *per se* rule has been restricted to those situations in which a seller has ceded to his supplier some of his authority to set prices." (footnote omitted)).[13]

Nor, finally, could such a new *per se* rule be justified (as the court of appeals did not even attempt to do) under the applicable strict standard, which requires that experience make it immediately obvious that the practice

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[12] *See Butera v. Sun Oil Co.*, 496 F.2d 434, 436-38 (1st Cir. 1974); *Seabord Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 375 (3d Cir. 1985); *Lewis Serv. Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842, 847 (8th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *Sun Oil Co. v. Vickers Refining Co.*, 414 F.2d 383 (8th Cir. 1969); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 886 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983); *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203, 1206 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983). *See also Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 259 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) ("The Supreme Court has not condemned vertical price-fixing outside of the resale price maintenance context.").

[13] The liability found by the Eleventh Circuit cannot be supported, as DeLong has attempted to do, by the linguistic ploy of treating all "vertical price fixing" as *per se* illegal and then observing that "price" is a subject of this vertical agreement. "Vertical price fixing" in this Court's decisions has always referred to agreements on *resale* prices. Evidently, however, it would be useful for this Court to clarify some of its language drawing a dichotomy between vertical "price" and "nonprice" restraints. *See, e.g., Business Elecs.*, 485 U.S. at 725; *Monsanto*, 465 U.S. at 762.

at issue is always or almost always anticompetitive. *See Business Elecs.*, 485 U.S. at 723-24 (quoting cases). To the contrary, a manufacturer's agreement with its distributor on wholesale prices charged to other distributors may be both beneficial and lawful. If the manufacturer agrees that it will charge the *same* wholesale prices to other distributors, the agreement will often be nothing more than a commitment not to engage in price discrimination in violation of the Robinson-Patman Act. If the manufacturer agrees to charge one distributor *less* than it charges another, that agreement may serve various procompetitive goals, such as preventing free-riding by one distributor off the services of another, as Washington Mills alleged here with respect to its payments to BCS for developing Pratt's business (which DeLong was about to exploit). *See Business Elecs.*, 485 U.S. at 728 (free-rider problem). Indeed, this Court has explained that a vertical price-discrimination agreement is often *pro*competitive, holding that Congress has protected such agreements against *per se* condemnation in the statutory provision (of the Robinson-Patman Act) specifically directed to the issue. 15 U.S.C. § 13(f) (relating to buyer inducement of price discrimination). *See Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 82-83 (1979); *USM Corp. v. SPS Technologies, Inc.*, 694 F.2d 505, 512 (7th Cir. 1982), *cert. denied*, 462 U.S. 1107 (1983) ("no general principle of antitrust law forbids charging different prices to different customers"; such conduct "is not illegal per se, even under [the Robinson-Patman Act]").

The ruling below thus represents an unjustified, as well as unprecedented, extension of *per se* illegality for vertical agreements. The result threatens a range of business arrangements that present no antitrust concern. And it flies in the face of this Court's repeated insistence on limiting, rather than expanding, *per se* liability for vertical arrangements.

II. THE COURT OF APPEALS INCORRECTLY FOUND A TERMINATED DISTRIBUTOR'S FUTURE LOST PROFITS TO BE ANTITRUST INJURY WITHOUT TYING THE INJURY TO THE VIOLATION (MINIMUM RESALE PRICE MAINTENANCE) AND WITHOUT REQUIRING HARM TO COMPETITION OR EVEN TO THE DISTRIBUTOR'S ABILITY TO COMPETE.

Even if a resale price agreement between Washington Mills and BCS could validly be found in this case, the Eleventh Circuit erred in finding that DeLong may claim antitrust injury based on its alleged lost future opportunity to compete. This Court made clear in *Atlantic Richfield Co. v. USA Petroleum Co.* that antitrust injury must be proved even for a *per se* violation and requires a showing over and above that which proves the violation. 495 U.S. at 341-44. In this case, the Eleventh Circuit's finding of antitrust injury violates the commands of *Atlantic Richfield,* and other circuits' decisions, in two respects.

A. The Injury Is Not Traceable to Resale Price Maintenance.

The court of appeals failed to require that DeLong's lost opportunity to compete "flows from that which makes defendants' acts unlawful" (*Brunswick Corp.*, 429 U.S. at 489)—the (assumed) illegal minimum resale price agreement between Washington Mills and BCS. This Court has expressly recognized that no such showing is possible. In *Atlantic Richfield,* which involved a maximum resale price agreement, the Court reiterated what it had said in *Matsushita* about antitrust injury based on a competitor's agreement to *minimum* prices:

> Even if the maximum-price agreement ultimately had acquired all of the attributes of a minimum-price-fixing scheme, respondent [USA] still would not have suffered antitrust injury because higher ARCO prices would have worked to USA's advantage. A competitor "may not complain of conspiracies that . . . set minimum prices at *any* level." *Matsushita,* 475 U.S.

> at 585 n.8; *see also id.* at 582-583 ("[R]espondents [cannot] recover damages for any conspiracy by petitioners to charge higher than competitive prices in the . . . market. Such conduct would indeed violate the Sherman Act, but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price . . .").

495 U.S. at 337 (internal citations shortened). That conclusion is flatly inconsistent with the Eleventh Circuit's finding of antitrust injury in this case.

To be sure, termination pursuant to a resale price agreement might render a terminated dealer unable to compete (given the proper market showing). The Court's discussion in *Atlantic Richfield*, however, makes clear that the loss would be attributable to the termination agreement, not to the higher resale prices—which is "that which makes defendants' acts unlawful" *(Brunswick Corp.*, 429 U.S. at 489). Antitrust injury requires that the specific harm "correspond[] to the rationale for finding a violation of the antitrust laws in the first place." *Atlantic Richfield*, 495 U.S. at 342. For a *Dr. Miles* violation, that rationale is the protection of the pricing freedom of the agreeing distributor—a rationale that would (at most) enable BCS or DeLong to challenge the higher prices it had actually paid. But the *Dr. Miles* rationale does not protect the interest DeLong asserts, *i.e.*, the future interest in a continuing distributorship of the Washington Mills brand. That interest is protected only by the rule of reason, as *Business Electronics* and *GTE Sylvania* make clear. DeLong's asserted injury, therefore, cannot be tied to the specific basis of illegality.[14]

[14] DeLong's attempt to tie its asserted injury to higher resale prices of BCS also suffers from a temporal mismatch. DeLong's entire asserted injury on the Section 1 claim was for *future*, *i.e.*, post-termination, lost profits. But by the time DeLong was terminated, BCS was no longer a distributor to Pratt, so there could have been no resale price maintenance during the time of the claimed injury.

The Fifth Circuit, in a related context, has recognized just such a specific causation requirement in rejecting antitrust injury based on the loss of opportunity to compete. *Anago, Inc. v. Tecnol Medical Prods., Inc.*, 976 F.2d 248 (1992). The Fifth Circuit held there that a takeover target could not challenge the merger as anticompetitive because it was the merger, not the anticompetitive character of the merger, that caused the injury (future inability to compete). *Id.* at 250-51. The same harm would occur even if the merger were not anticompetitive. *Ibid.* So, too, here: DeLong's claimed harm follows from the termination, independently of any resale price agreement underlying the termination. The Eleventh Circuit's decision in this case thus is inconsistent with *Anago* and should, at a minimum, be held for consideration in conjunction with the closely related antitrust-injury question presented in the pending petition for certiorari from the *Anago* decision. No. 92-1274; *see* 113 S. Ct. 1576 (1993) (inviting views of Solicitor General).

B. The Injury Does Not Reflect Any Anticompetitive Effects.

Independently justifying review and reversal, the court of appeals failed to require that the asserted loss be tied to an adverse effect of the termination on market competition. This Court explained in *Atlantic Richfield* that antitrust injury even in a *per se* case requires that the particular conduct be shown to have *anti*competitive effects:

> Conduct in violation of the antitrust laws may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior. The need for this showing is at least as great under the *per se* rule as under the rule of reason.

495 U.S. at 343-44. The Court therefore insisted that, beyond showing a *per se* violation, the plaintiff in *Atlantic Richfield* had to show specific "*anticompetitive* effects" of the violation in their case. *Id.* at 345. The Eleventh Circuit in this case ignored this clear requirement.

First, the Eleventh Circuit required no showing that the assumed *per se* violation here harmed *competition* (even if it harmed particular competitors). Indeed, the court disregarded its own repeated recognition (Pet. App. 2a, 59a-60a) that DeLong conceded the impossibility of any such showing. Under *Atlantic Richfield,* there can be no antitrust injury.

Second, and in any event, the Eleventh Circuit failed to require that even the single complaining competitor, DeLong, was rendered unable to compete in the market by its termination as a distributor of one brand. As the Sixth Circuit has clearly held, that requirement necessitates "proof that comparable alternative brands were not available." *Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc.,* 459 F.2d 138, 148 (1972); *Beach v. Viking Sewing Mach. Co.,* 784 F.2d 746, 752 (6th Cir. 1986). But the Eleventh Circuit ignored DeLong's plain ability to compete in what is indisputably a multi-brand, multi-purchaser market (DeLong has been thriving as a distributor since 1985, Tr. 1819), instead restricting its focus to a single customer, Pratt. And eevn as to that customer, the evidence cited by the court of appeals shows at most a three-year period when the Washington Mills brand was without competing substitutes. Pet. App. 23a. In no event can any inability to compete for 34 years into the future rationally be attributed to DeLong's termination as a distributor of the Washington Mills brand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 22, 1993

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 92-8049

DELONG EQUIPMENT COMPANY,
Plaintiff-Appellant,
Cross-Appellee,

v.

WASHINGTON MILLS ELECTRO MINERALS CORP., f/k/a, WASHINGTON MILLS ABRASIVE CO., WASHINGTON MILLS CERAMIC CORP., JOHN T. WILLIAMS and PETER WILLIAMS,
Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

May 17, 1993

Before KRAVITCH, Circuit Judge, GODBOLD and OAKES,* Senior Circuit Judges.

OAKES, Senior Circuit Judge:

The critical question presented by this case involves a conspiracy between a manufacturer and a favored dis-

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* Honorable James L. Oakes, Senior U.S. Circuit Judge for the Second Circuit, sitting by designation.

tributor. The object of the conspiracy was to raise wholesale prices to other distributors, including the plaintiff, on products to be sold to one large customer. It is of some significance that the wholesale price, as raised, was higher than prevailing retail prices. The antitrust law question is whether this conspiracy was a device to force an increase in the resale price, or a vertical agreement to fix the minimum resale price in violation of § 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1 (1988) (the "Act"). Resale price maintenance agreements are, of course, *per se* illegal restraints of trade within § 1 of the Act. Absent such *per se* illegality here, defendants concededly prevail.

This is the third time this court has addressed this case. The second time here, on appeal from a grant of summary judgment for the defendants, this court held that evidence proving such a conspiracy would support a finding of antitrust injury within the line of cases commencing with *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911), extending through *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), to and including *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988). *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499 (11th Cir.1989), *rehearing* and *rehearing en banc denied*, 896 F.2d 560, *cert. denied*, 494 U.S. 1081, 110 S.Ct. 1813, 108 L.Ed.2d 943 (1990) (*DeLong II*).[1] In *DeLong II*, this court indicated that the essence of the alleged conspiracy between the manufacturer and the favored distributor was to inflate the price of the manufacturer's standard product by labeling it "special" and "charging Pratt [the Pratt & Whitney Aircraft Division of United Technologies Corp., a significant customer] a significantly

[1] *Delong I, Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843 (11th Cir.1988), involved issues of personal jurisdiction.

higher price than Washington Mill's list price for [the] identical [product]." 887 F.2d at 1509. Following this court's ruling in *DeLong II*, a jury trial resulted in a verdict for the plaintiff distributor against the defendant manufacturer, the favored distributor defendant having settled with the plaintiff after *DeLong I*. We are now faced with an appeal from the district court's denial of motions for judgment notwithstanding the verdict on the plaintiff-distributor's Sherman Act price-fixing, Robertson-Patman Act price-discrimination and common-law fraud verdicts; with a cross-appeal from the district court's grant of a new trial on Sherman Act damages and Robinson-Patman Act damages; and with an appeal from the awarding to the manufacturer defendant of pre-judgment interest on a counterclaim for outstanding debts.

Because the key questions in the case involve consideration of issues addressed in this court's last opinion, this appeal thus requires consideration of the ancient but venerable doctrine of "the law of the case." In addition, the case raises questions of sufficiency of proof, injury in fact, and conspiracy. Problems of interlocutory review are not involved, however, since this court granted petitions for review of all of the issues following district court certification, pursuant to 28 U.S.C. § 1292(b) (1988).

I. BACKGROUND

A. *Facts:*

While the background facts were well set forth in *DeLong II*, in the interests of easier understanding, we will recount them here. The plaintiff distributor is DeLong Equipment Company ("DeLong"), a Georgia corporation wholly owned by Harold DeLong. DeLong distributes equipment and supplies used to polish and deburr metal parts in industrial manufacturing processes. The critical product in this process, called "media," consists of abrasive materials which are placed in vibratory machinery with the metal parts to be polished and deburred.

Media can consist of natural products, such as sand without the backing paper used in sandpaper. The media involved in this case, however, known as "preformed ceramic media," is made from a blend of clays, sands and polishing agents, extruded through metal molds and cut into different shapes, such as cylinders, stars, rectangles or triangles, after which it is baked and dried. The media is packed by the manufacturer and shipped either to distributors such as DeLong or directly to customers. Distributors, as pointed out in *DeLong II*, not only provide regular and prompt delivery of media and related supplies, but also consult with the end user, helping it select the appropriate equipment, media, power, speed and time to bring the user's product to the correct state of polish.

The manufacturer defendants-appellants and cross-appellees are Washington Mills Electro Minerals Corporation, formerly known as Washington Mills Abrasive Company, located in North Grafton, Massachusetts and in the business since 1868, and its wholly-owned subsidiary Washington Mills Ceramic Corporation, located in Lake Wales, Florida. They are joined in their appeal by the two individual defendants-appellants, officer/owners John T. Williams and Peter Williams (who are not related). For simplicity, we will refer to the Washington Mills Electro Minerals Corp., its officers and its subsidiary collectively as "Washington Mills."

The other primary actor in this case, the BCS Company, Inc. ("BCS"), settled with DeLong before *DeLong II*. BCS, located in Thompson, Connecticut, is a distributor of media with a business quite similar to DeLong's. Both BCS and DeLong have distributed Washington Mills' products since the early 1980s, and BCS was Washington Mills' primary distributor in the northeastern United States during all times relevant to this litigation. Neither DeLong nor BCS itself manufacture media, but both distribute media manufactured by other

companies, including but not limited to Washington Mills. Like other Washington Mills distributors, generally speaking, DeLong and BCS purchased media for resale at a wholesale discount rate of 25% off the retail list price. Since no Washington Mills distributors had exclusive territories or franchise areas, the distributors competed for end-user accounts. They received standard price lists showing the size, shape, composition and price per pound of each kind of "stock" media in the Washington Mills manufacturing inventory. The price list also indicated that customers could request "special" media if they met minimum volume requirements and paid for a new die if one was needed to produce the media.

The specific, key customer involved was the Pratt & Whitney Aircraft Division of United Technologies Corporation ("Pratt"). Pratt, which manufactures aircraft engines and uses ceramic preformed media to polish its jet engine blades, is not a party to this action but, before this case, was one of Washington Mills' largest end-user customers. As one might suspect, Pratt's engineering department tests and approves the use of specific materials in its manufacturing processes and issues specifications used by the purchasing department to solicit bids for any given products necessary; these specifications appear on Pratt product material control dockets ("PMCs"). With exceptions not relevant here, the Pratt purchasing department may only purchase pre-approved ~~items specified on~~ the PMCs from pre-approved dealers and the materials delivered must have the PMC numbers stamped on the box. The media at issue here, manufactured by Washington Mills for Pratt and known as "special," were approved by Pratt after testing and designated on the appropriate PMCs as "P & W 5,000" (PMC 3175), "P & W 6,000" (PMC 3178) and "P & W 7,000" (PMC 3179). The testing and approval of the Washington Mills products was done by Pratt engineers in East Hartford, Connecticut, in consultation with William and Robert Biebel of BCS. James Neal, a Pratt engineer and a friend

of the Biebels, obtained the issuance of the PMCs for the "special" Washingon Mills media furnished by BCS. BCS was designated in the Pratt PMC as "manufacturer" and the product was labeled accordingly both by BCS itself and by Washington Mills on empty boxes for the products to be supplied to Pratt.

There was ample proof at trial to support the allegations in DeLong's complaint that the "special" media involved in this case was actually generic, that is, media that Washington Mills regularly produced and carried in stock, and that this "special" media, sold to the specific customer around whom this case revolves, did not differ in composition from the generic media stocked by Washington Mills. Thus, the evidence is essentially conclusive that it cost Washington Mills no more to produce the "special" media involved in this case than it did to produce its regular line set forth in its standard price list. Pratt, in other words, was duped.

At the time Pratt issued its PMC for the purchase of "BCS-manufactured" special media, Washington Mills was selling the very same media generically to BCS for .495 dollars per pound. This price was based on Washington Mills's standard distributors' discount of 25% off its retail price of .66 dollars per pound. BCS's resale price to Pratt on its initial sales from February through October 5, 1983, however, was .97 dollars per pound, giving BCS a profit of .475, or 96%. Meanwhile, Pratt was both designing a new jet engine and planning on building a new production facility; as of the spring of 1983 it did build such a facility in Columbus, Georgia, not far from DeLong's place of business. Harold DeLong became aware of Pratt's plans and decided to pursue the account as an approved vendor. He began by asking the Washington Mills sales representative, Peter Ford, what type of media was being provided to the Pratt East Hartford plant, but was told only that BCS was "handling" the Pratt account. Harold DeLong was not able to learn from Ford what specific products Pratt required.

Nevertheless, DeLong solicited business from Pratt as early as June, 1983. Evidently when word of this got back to Connecticut, the Washington Mills sales representative, Ford, asked Harold DeLong to meet in Atlanta with Robert Biebel of BCS in August, 1983. Biebel indicated to Harold DeLong that he was willing to work with DeLong in a joint venture and that there was "plenty of money in it" for both DeLong and BCS. Harold DeLong declined the offer, reasoning that he did not need BCS's help. After the Atlanta meeting and perhaps after Harold DeLong expressed his suspicions that the Pratt "special" media was really generic stock Washington Mills media, BCS and Washington Mills agreed on the price-fixing scheme brought into question here. The scheme was that Washington Mills would raise the wholesale price paid by BCS for media to be resold to Pratt from .495 dollars to .85 dollars per pound, but Washington Mills would pay back to BCS the difference. This was to be and was in fact done by sending disguised payments through Wood & Thompson, a foreign corporation in Nassau, the Bahamas, created by BCS shortly after BCS learned that Pratt was locating its new jet engine facility in Georgia. The payback checks and internal vouchers did not identify BCS and were issued for fictitious invoices made payable to Wood & Thompson and mailed directly to the Bahamas. The evidence was that the offshore company was established in order to keep such payments "private," and Washington Mills did not report them to the I.R.S. on a Form 1099. Not surprisingly, perhaps, the payback checks are called "kickbacks" by DeLong and "commissions" by Washington Mills.

At an August, 1983 meeting at Pratt's East Hartford, Connecticut plant between representatives of Washington Mills and Pratt, the Washington Mills personnel present gave Pratt the Washington Mills designation of "P & W special 5,000" in connection with the Pratt PMC 3175 and "P & W special 6,000 and 7,000" to correspond to

the two Pratt PMCs, 3178 and 3179. As previously indicated, the "P & W special 5,000" was a stock item available at .495 per pound to all Washington Mills distributors, and the "P & W special 6,000 and 7,000" also were identical to media listed in the stock price list at .495 per pound for distributors (at the 25% discount from the retail list price of .66 per pound). On September 1, 1983, the day after BCS filled a purchase order for 10,000 pounds of PMC 3175 destined for the Columbus facility, various Pratt representatives visited DeLong to survey DeLong in response to its previous request for formal supplier qualification. In that meeting, they provided DeLong with a list of the products that Pratt needed, setting forth BCS computer code numbers. DeLong understood from this meeting that it was qualified as a Pratt vendor. On October 6, 1983, Pratt issued a blanket purchase order number 4929748 for 86,400 pounds of PMC 3175 for use at the Columbus plant. DeLong could not bid on this order because Washington Mills had not as yet supplied it with the product identification for Pratt media, with the result that BCS made the sale. Between October 7, 1983 and October 17, 1984 BCS was to fill this entire order at .91 dollars per pound, although at first the order was fulfilled from earlier purchases of media and before the kickback arrangement went into effect.

By letter of November 4, 1983, Washington Mills finally provided DeLong with Pratt media designations, but informed DeLong that the wholesale price to DeLong would be .85 dollars per pound. As stated, until that time Washington Mills had charged BCS only .495 dollars per pound for identical media. DeLong immediately called and questioned the "special" designation and the 85-cent price, stating that the media samples appeared to be standard Washington Mills stock media which could be ordered at .495 dollars per pound from the price list. When the Washington Mills representative insisted that the media were special, DeLong replied that "everyone

had better be paying the same price for the 'specials'." Indeed, on January 18, 1984, in BCS's first purchase of PMC 3175 thereafter, BCS was charged 85 cents per pound for 12,500 lb. of a Pratt special. Pursuant to the payback agreement, however, Washington Mills paid .355 dollars per pound to BCS through Wood & Thompson, making the BCS price for the special media exactly .495 dollars per pound, the very same price that BCS had paid for the media prior to the Washington Mills November 4, 1983 letter to DeLong. Both Robert Biebel of BCS and the treasurer of Washington Mills testified that the payments to Wood & Thompson were calculated to maintain BCS's pre-November, 1983 price.

In the spring of 1984, the Washington Mills representative with whom DeLong had dealt left the company and two new salesmen, Robert Baldauf and Hans Van der Sande, began dealing with DeLong. According to them, DeLong raised the issue of "special designation of Pratt media every time he had the opportunity." DeLong also conducted independent laboratory tests, concluding that the media were identical. Nevertheless, Washington Mills continued to charge DeLong the .85 price and, while DeLong sold some small amounts to the Pratt plant at Columbus, Pratt's requirements for this plant were satisfied largely by deliveries from BCS under the prior October, 1983 order. There was no reason for Pratt to stop ordering media from BCS, though it could have canceled that order under its terms, since it was receiving the product at a price of 91 cents a pound, which DeLong could not meet, given its cost from Washington Mills of 85 cents a pound F.O.B. Lake Wales, Florida. Consequently, DeLong sold a total of only 6,150 pounds of media to Pratt during 1984.

Van de Sande testified that after the last deliveries were made by BCS under the October, 1983 order, Biebel, Van der Sande and Baldauf visited Pratt in Columbus, Georgia (almost simultaneously visiting DeLong in Atlanta), to lay the groundwork for using Washington Mills trucks

and Lake Wales warehousing to deliver media directly to Pratt at the rate of 750,000 to 1 million pounds per year. According to Biebel, BCS felt secure for three years, since that was the time it ordinarily took Pratt to get a material approved, "unless DeLong d[id] not play the game." According to Van der Sande, this meant that DeLong might "upset the apple cart." As a result of this visit, Pratt's orders were placed directly with Washington Mills as of November 12, 1984, with special retail prices charged for what was actually generic media, and on these direct sales BCS continued to receive kickbacks, though in varying amounts. DeLong, smarting, perhaps, continued to raise concerns regarding the "special" designation and inflated price. Washington Mills terminated DeLong as a distributor in August, 1985, and while it introduced evidence to the effect that the termination was because DeLong had made incorrect payments and DeLong personnel had been abusive, the jury found these claims to be pretextual.

B. *Procedural History:*

DeLong brought this action in February, 1986, alleging violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1988); § 2 of the Clayton Act as amended by § 1 of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1988); § 3 of the Clayton Act, 15 U.S.C. § 14, and various violations of Georgia law, including breach of contract, tortious interference with business relationships and fraud. DeLong alleged, *inter alia*, that it was terminated for failure to participate in the scheme between Washington Mills and BCS to fix the price of media sold to Pratt, and Washington Mills asserted as defenses that the termination was in response to payment delays and abusive DeLong employees. This court reversed the dismissal of Robert Biebel and BCS for lack of personal jurisdiction (affirming as to William Biebel) in *DeLong I*, 840 F.2d 843 (11th Cir.1988). Thereafter, the district court granted the defendants' motion for summary

judgment on all counts except some aspects of the Robinson-Patman Act count, but certified the grant under Fed. R.Civ.P. 54(b) to the Court of Appeals which, in *Delong II, reversed.* 887 F.2d 1499 (11th Cir.1989). After that reversal, the district court vacated its directed verdict in a trial limited to the Robinson-Patman Act count which had been held pending the appeal in *DeLong II*, granting a new trial as to the claims there tried, and consolidated all counts for a second jury trial which began July 30, 1990 and was concluded after five weeks with 19 witnesses and thousands of pages of exhibits. The district court directed a verdict for Washington Mills on a counterclaim for outstanding bills and submitted DeLong's Sherman Act, Robinson-Patman Act, and fraud claims to the jury. The jury returned a verdict for DeLong on August 21, 1990 on the Sherman Act count in the sum of $2,033,295, on the Robinson-Patman Act count in the sum of $50,216.25 and on the common law count for $117,824, including $100,000 in punitive damages. The district court entered its judgment on September 21, 1990, trebling the antitrust damages to $6,099,885 on the Sherman Act count and $150,648.75 on the Robinson-Patman Act count. On October 1, 1990, DeLong moved to alter or amend the judgment on the counterclaim to eliminate pre-judgment interest, and on October 5, 1990, Washington Mills moved alternatively for judgment notwithstanding the verdict or a new trial as to DeLong's judgment. On April 1, 1991, the district court entered an order deferring ruling on the post-judgment motions, held a hearing on May 2, 1991, and entered an order on September 30, 1991 denying the Washington Mills motions for judgment notwithstanding the verdict on all counts,[2] and denying the motion for a new trial as to liability on

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[2] Effective December, 1991, Fed.R.Civ.P. 50(b) refers to such motions as renewed motions for judgment as a matter of law. Since these motions were filed before the amendment became effective, we use the old language of motion for "judgment notwithstanding the verdict" or "JNOV."

the antitrust claims and liability and damages on the common-law fraud count. The district court, however, granted a new trial as to the measure of damages under both the Sherman Act and Robinson-Patman Act counts, and denied DeLong's motion for judgment notwithstanding the verdict as to the interest awarded on Washington Mills' counterclaim. The trial court granted cross motions to certify for interlocutory review pursuant to 28 U.S.C. § 1292(b) on November 20, 1991, and this court granted cross petitions for such review.

C. *Standard of Review:*

This court reviews *de novo* a denial of judgment notwithstanding the verdict, *see Watts v. Great Atl. & Pac. Tea Co.*, 842 F.2d 307, 309-10 (11th Cir.1988), including in an antitrust case the question of antitrust injury which is one component of whether or not the plaintiff has standing, a question of law. *See Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir.1991). The grant of the motion, as here, for a new trial is generally reviewed under an abuse of discretion standard, though when it is on evidentiary grounds the verdict must be against the great weight of the evidence to sustain the grant. *E.g., Rixey v. West Paces Ferry Hosp., Inc.*, 916 F.2d 608, 611-12 (11th Cir.1990); *Jackson v. Magnolia Brokerage Co.*, 742 F.2d 1305, 1307 (11th Cir.1984).

Review is of course *de novo* where the trial court's order involves an error of law. *See, e.g., Allstate Ins. Co. v. Springer*, 269 F.2d 805, 808 (6th Cir.1959), *cert. denied*, 361 U.S. 932, 80 S.Ct. 370, 4 L.Ed.2d 353 (1960). We recognize that bearing on the above are the points that the grant of a new trial on an evidentiary basis involves a possible intrusion upon the function of a jury, *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir.1984); *Spurlin v. General Motors Corp.*, 528 F.2d 612, 619-20 (5th Cir.1976), and that damages are an issue as to which considerable discretion is committed

to the jury, *Quality Foods, Inc. v. U.S. Fire Ins. Co.*, 715 F.2d 539, 542 (11th Cir.1983); *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 903 (5th Cir.), *cert. denied*, 412 U.S. 923, 93 S.Ct. 2736, 37 L.Ed.2d 150 (1973) (antitrust damages); *see Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24, 89 S.Ct. 1562, 1576-77, 23 L.Ed.2d 129 (1969) (antitrust). At the same time, we recognize that both *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), involving a horizontal restraint on trade, and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), involving a vertical restraint, limit the permissible range of inferences of conspiracy that may be drawn in the antitrust context of restraints of trade.

II. DISCUSSION

We will discuss the issues in the case much as the parties have in their briefs, *viz:* by separating the issues appealed by Washington Mills resulting from the denial of its motions for judgment notwithstanding the verdict and the issues on the cross-appeal by DeLong resulting from the grant of the Washington Mills motions for a new trial in respect to damages, on both the Sherman Act and the Robinson-Patman Act counts.

A. *Proof of Conspiracy:*

Washington Mills claims that there was insufficient evidence at trial to support a finding of conspiracy, and that the inferences of concerted action between BCS and Washington Mills were negated at trial by the testimony of plaintiff's own witnesses, Washington Mills having called Robert Biebel, Baldauf and Van der Sande. We note that Baldauf, a former southeastern sales representative for Washington Mills, and Van der Sande, Washington Mills' former national sales manager, both left Washington Mills to form a competing manufacturer, Ceratech. Baldauf and Van der Sande testified that they had not known of

any effort to fix prices of media or acted in furtherance of a conspiracy to fix those prices. Robert Biebel testified that he had nothing to do with the 85 cents per pound charged BCS or DeLong for the Pratt "special" media by Washington Mills, or had any agreement with anybody at Washington Mills as to the price at which BCS would sell media, whether before or after DeLong was terminated, or the price at which Washington Mills would sell media to DeLong, or with anyone as to termination of DeLong as a distributor. Washington Mills contends that against this "direct and positive evidence" DeLong offered only a string of inferences that an agreement on price could have been reached, and that this evidence is "so highly ambiguous" as not to support a finding of conspiracy according to the terms of *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763, 104 S.Ct. 1464, 1470, 79 L.Ed.2d 775 (1984) and *Riverview Invs., Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir.), *cert. denied*, 498 U.S. 855, 111 S.Ct. 151, 112 L.Ed.2d 117 (1990). We agree with DeLong, however, that there was substantial evidence to support the finding of conspiracy. There was evidence that the so-called "special" media for Pratt was identical to stock media, and that the increased price charged by Washington Mills for the product to Pratt was not justified by any cost differential. Indeed, two of the "special" media, known as P & W 6,000 and P & W 7,000, were clearly identified as stock media on Washington Mills' price list. As for P & W 5,000, while it was not listed on a stock price list, it was available at all relevant times at the stock price on orders for more than 10,000 lbs. or at the stock price plus a nominal charge for producing a die on smaller orders; as to it, the actual added cost was minimal, and it was composed of the same materials as the other generic media. Moreover, Washington Mills sold all three types of "Pratt" media to other customers as well as to BCS, at the stock price.

In addition, it was the Washington Mills sales representative, Peter Ford, who arranged the meeting between Robert Biebel of BCS and Harold DeLong in August, 1983, at which meeting Biebel proposed a "joint venture," saying "there is plenty of money in it" for everyone. It was after this meeting that Washington Mills joined in the arrangement for special pricing of $.85 per pound to BCS, with a "kickback" or "commission" to BCS through BCS's offshore affiliate, Wood & Thompson, reducing the effective price to the original $.495 per pound.

At about the same time that Ford met with DeLong, he met with Pratt in August, 1983 and gave it the new Washington Mills special media designations for the stock media sold to distributors at .495 per pound, retailing for $.66 per pound. BCS quoted Pratt a price of $.91 per pound in its successful October, 1983 order but Ford ignored DeLong's September 1, 1983 request for confirmation of the identity and price of these "specials" and delayed giving DeLong a Washington Mills quotation long enough to prevent DeLong from bidding on the October, 1983 order. When Ford did finally write to DeLong on November 4, 1983, calling the Pratt media "specials" and quoting the distributor price as $.85 per pound, BCS did not receive a price announcement letter. As DeLong points out, the jury could have concluded properly that BCS was not informed because it was part of the conspiracy which already knew the price arrangements, including the kickback arrangement, which would enable it to make up the difference between the regular price for generic media and the .85 quote to DeLong.

A year later, in October, 1984, Van der Sande and Baldauf came into the picture, at the time BCS was scheduled to make the last delivery to Pratt under the October, 1983 order. By this time, Washington Mills and BCS had a new scheme to support the Pratt price. They urged Pratt to purchase media directly from the manufacturer, bypassing DeLong, with Washington Mills agreeing to pay

kickbacks to BCS even on the direct sales. Indeed, Van der Sande's report of that meeting stated that Robert Biebel had said he had several good friends at Pratt who from time to time took trips on his boat to the Bahamas, which friendships gave him an edge on the competition. Van der Sande thought that Pratt would likely become Washington Mills' largest media customer, buying $750,000-$1,000,000 worth of media per year. Van der Sande reported to Washington that "Bob Biebel feels we are secure for at least three years unless DeLong does not play the game." Van der Sande did not mention his meeting with the Pratt people in Georgia the day before he visited DeLong, but he did say that DeLong was "not very happy" with BCS and Pratt.

Perhaps the critical fact in terms of a conspiracy is that Washington Mills rebated to BCS the total difference, right to the half penny, between its new 85 cent price and the 49.5 cent stock price. This totally destroyed any argument that increased costs justified a higher price. If it was supposed to reflect some greater care or concern on the part of BCS toward Pratt, then DeLong should have been allowed to accept the same degree of responsibility at the same price. Instead, Delong, when it continued to complain about the pricing and the use of stock media under "special" labels to Pratt, was terminated on what the jury found were the pretextual reasons of being behind in payments to Washington Mills and abusive to Washington Mills personnel, allegations that were identified by the Court of Appeals in *DeLong II* as "[g]enuine issues of material fact. . . ." 887 F.2d at 1513.

The long and the short of it is that the jury could properly conclude that Washington Mills and BCS conspired to fix the price of Washington Mills media both to DeLong and to Pratt under the fraudulent cover that the generic media was "special," and by the fraudulent means of kickbacks by way of "commissions" to BCS's offshore shell corporation.

B. *Legal Arguments on the Sherman Antitrust Act Claims:*

Of considerably more stature are appellant's three principal legal arguments, namely, that DeLong failed to establish "antitrust injury"; that DeLong failed to establish "injury in fact" (because numerous other sources of supply were available to DeLong); and that DeLong failed to establish an agreement regarding resale price, as required by *Business Electronics,* on the basis that resale price maintenance is a required element of a vertical price-fixing claim, and that there was no evidence at trial of a fixed "pad" to be added to BCS's resale price or any other agreement or restriction on the price to be charged by BCS.

Each of these legal arguments runs headlong into the doctrine of "law of the case." As well put in another antitrust act case decided by this court's predecessor, the Fifth Circuit, a decision of the Court of Appeals at an earlier stage of the same case represents the law of the case not only as to matters "decided explicitly" but also as to those "decided by necessary implication." *Terrell v. Household Goods Carriers' Bureau,* 494 F.2d 16, 19 (5th Cir. 1974), *cert. dismissed,* 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974). The district court must follow the appellate decision as to these issues on remand, *id.*, and generally speaking the appellate court must do so in future rulings in the case as well, *id.* at 19-20. Recognizing that the doctrine "is not an inexorable command that rigidly binds the court to its former decisions, but rather is an expression of good sense and wise judicial practice," *id.* at 19, the general rule is that "an appellate court's decision of issues must be followed in all subsequent trial or intermediate appellate proceedings in the same case" except when there are "the most cogent of reasons," such as a change in controlling authority, new evidence or the need to avoid manifest injustice. *Id.* at 19-20. *See also, e.g., Virgin Atl. Airways, Ltd. v. National Mediation Bd.,*

956 F.2d 1245, 1255 (2d Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 67, 121 L.Ed.2d 34 (1992). As the Supreme Court has said, the "[l]aw of the case directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983). *See also* 18 Charles A. Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure* § 4478 at 790 (1981).

Under the law of the case doctrine, *DeLong II* basically decided the Sherman Act liability claims against Washington Mills on the matters of law argued here, and there has been no intervening change in the law since *DeLong II* was decided. *See DeLong II*, 887 F.2d 1499. The *DeLong II* court addressed these issues in the context of a grant of summary judgment to the defendants on the theory that the conspiracy alleged and the evidence adduced to establish it did not describe a vertical restraint on trade. The *DeLong II* court held that the alleged conspiracy to restrain competition here was "to fix prices of media sold to Pratt by designating ordinary media as 'special' media and selling it at an artificially inflated price to Pratt." 887 F.2d at 1505. The *DeLong II* court ruled that such a conspiracy, if proven, was a vertical restraint within the meaning of *Business Electronics Corp.*, 485 U.S. at 730 & n. 4, 108 S.Ct. at 1522 & n. 4, *DeLong II*, 887 F.2d at 1505-06, and furthermore that it was a vertical restraint that "include[d] some agreement on price or price levels." *Id.* at 1506 (quoting *Business Elecs*, 485 U.S. at 736, 108 S.Ct. at 1525). After pointing out that this case involves termination of DeLong as a distributor of Washington Mills "in furtherance of" the vertical price restraint conspiracy, *DeLong II*, 887 F.2d at 1505, the court in *DeLong II*, citing *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. at 760-61, 104 S.Ct. at 1469, distinctly held that the restraints alleged there and proven on remand were not "non-price in nature" as the district court had held, 887 F.2d at 1506-07, but, rather, con-

stituted "a vertical *price* conspiracy," *id.* at 1507, within the meaning of *Business Electronics,* "to artificially inflate or 'pad' the price." 887 F.2d at 1507 & n. 11. The *DeLong II* court went on to hold that the conspiracy alleged was an objectively and economically reasonable one within the meaning of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538, and that there was not only evidence of concerted action by inference, but a tendency of the evidence "to exclude the inference of independent action." *DeLong II,* 887 F.2d at 1508-09 (quoting *Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc.,* 818 F.2d 1530, 1534 & n. 4 (11th Cir.1987)). Reciting the evidence of conspiracy above mentioned, the *DeLong II* court went on to demonstrate how the evidence supported DeLong's assertion that it was an obstacle to the continuation of the scheme between Washington Mills and BCS to "pad" the Pratt price, and that DeLong was terminated to remove that obstacle, 887 F.2d at 1512-15, adding that DeLong had "adduced evidence which tends to exclude the possibility that Washington Mills was acting independently when it terminated DeLong." 887 F.2d at 1514.

Thus, the law of the case doctrine is applicable and we see no reason to hold otherwise. While *DeLong II* did not say that the evidence presented necessarily established the vertical price conspiracy, it did say that the evidence of such a conspiracy sufficed to defeat summary judgment. On remand, a jury presented with evidence at least as strong as that recounted in the *DeLong II* opinion concluded that such a conspiracy had been established.

Nevertheless, we realize that the doctrine of the law of the case "permits a change of position if it appears that the court's original ruling was erroneous." *DiLaura v. Power Auth. of the State of N.Y.,* 982 F.2d 73, 77 (2d Cir.1992), *quoting Petitions of the Kinsman Transit Co.,* 388 F.2d 821, 825 n. 9 (2d Cir.1968). *See also*

Arizona v. California, 460 U.S. 605, 618 n. 8, 103 S.Ct. 1382, 1391 n. 8 (1983). Recognizing the great deference that is owing to the unanimous determination of the previous panel on summary judgment, "reached in a case that [was] already well advanced and designed to control further proceedings," 18 Wright, Miller & Cooper, § 4478 at 796, we nevertheless in the interests of certitude reexamine on the merits the points of law raised.

1. Injury in Fact.

Perhaps least susceptible to law of the case argumentation is Washington Mills' point that DeLong did not establish injury in fact because it was undisputed that numerous other sources of media were and are available to it; thus, the defendants argue that there is no causal connection between the termination and DeLong's claimed lost profits because there were "alternative comparable substitute[s] for the desired merchandise." *Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc.*, 459 F.2d 138, 148 (6th Cir.1972). The basis for this argument is an admission by DeLong's expert, Dr. Seaman, that it was a "possibility" that DeLong could capture all of Pratt's business, selling media furnished by other manufacturers DeLong "[could] get approved." That condition—that DeLong could get other media approved—was explicit in the question put to Dr. Seaman.[3] As we have noted, however, Pratt, presumably concerned with the extraordinarily high standards applicable to jet aircraft engine propellers, had careful procedures for approving products to which the Washington Mills media already

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[3] Q. [By Mr. Coe]: Given his perfect setup and his positioning and his competitive pricing, Doctor, there's not a reason in the world why he [DeLong] can't capture all of Pratt's business selling Wisconsin Porcelain, Abrasive Finishing, Capco, Vibra-finish or anybody else he can get approved, is there, Ceratech; isn't that true? [Wisconsin Porcelain, Abrasive Finishing, Capco, and Ceratech are competing manufacturers of ceramic media.]

had been subjected. It would not automatically approve any preformed ceramic abrasive media, made by any manufacturer. The verdict indicates that the jury rejected the "possibility" that DeLong could compete effectively by simply getting Pratt to approve alternative products.

Washington Mills' more significant argument is that DeLong failed to establish antitrust injury, that is, injury "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). In other words, as later put in *Atlantic Richfield Co. v. USA Petroleum Corp.*, 495 U.S. 328, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990), even where the conduct complained of is illegal *per se*, a plaintiff must show that it is "adversely affected by an *anti-competitive* aspect of the defendant's conduct." *Id.* at 339, 110 S.Ct. at 1891 (re claims under § 4 of Clayton Act). *See also id.* at 339 n. 8, 110 S.Ct. at 1890 n. 8 (quoting Phillip P. Areeda and Herbert Hovenkamp, *Antitrust Law* ¶ 340.3b at 411 (1989 supp.); Areeda and Hovenkamp ¶ 340.3b at 470 (1991 supp.). Washington Mills also refers to *Todorov v. D.C.H. Healthcare Authority*, 921 F.2d 1438 (11th Cir.1991), for the proposition that determining antitrust standing "involves an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws." *Id.* at 1448. *Todorov* recognizes that a showing of antitrust injury, while necessary, is not always sufficient to establish standing. In short, these cases involve plaintiffs who protested their not being allowed to participate in an anti-competitive arrangement, or their loss of a monopolistic position.

However, DeLong's injury was a loss of opportunity to compete. DeLong made no further sales of preformed ceramic media to Pratt after its termination. DeLong

sought to obtain the list price for purposes of its charges to Pratt, doing what it could to reveal the padded price, and, hence, it can be said that DeLong was willing to subject itself to the competitive market for Washington Mills media and was not in the quest for "super-competitive" profits. Washington Mills, with a better product, offered better-than-competitive prices for its stock media.

Todorov, which incidentally cites *DeLong II* with approval on the means of establishing conspiracy, 921 F.2d at 1456, is not to the contrary. The plaintiff in that case relied upon a monopolistic profit theory to support recovery; unlike Dr. Todorov, DeLong was not interested in forestalling competition and maintaining an inflated price, but in obtaining the stock price at which he could make a profit that was usual in the business with the basic markup. In short, nothing in this case indicates that DeLong sought to benefit from the Washington Mills-BCS anti-competitive conduct or to obtain super-competitive prices. DeLong's contentions properly gave it standing on the basis that Washington Mills, at BCS's instigation and with BCS's assistance, unfairly took advantage of its short-term position as the only approved source of media by artificially inflating the wholesale price and thereby extracting super-competitive profits which it shared with BCS by payment of "commissions" or "kickbacks"; that it blocked competition among distributors of its generic media in the market for one of its largest end-customers; and that it terminated DeLong as a Washington Mills distributor when DeLong threatened not to "play the game." Thus, DeLong has sustained antitrust injury by loss of its Washington Mills distributorship and consequent loss of sales and profits. Because Washington Mills media had certain competitive advantages over alternative media, DeLong has not suffered damage simply from its own failure to compete in an open market with identical media made by other manufacturers. DeLong was not allowed to participate in the competitive market for Washington Mills media because it refused to go along with the Washington Mills/BCS price-fixing scheme.

But Washington Mills goes a step farther in arguing that DeLong's claimed injury boils down to the contention that, absent Washington Mills overcharging, Pratt would simply have continued to purchase Washington Mills products, without examining alternative sources of supply. On this basis, it is argued that DeLong's injury results from increased competition, which is by definition not an antitrust injury. Washington Mills and BCS, however, had seen "a window of opportunity," according to the testimony of Washington Mills President and controlling shareholder John Williams, during which they could charge non-market prices without regard to competition. Given BCS's approval and Pratt's purchasing practices, the conspirators had the power to exclude competition and maintain high prices over a longer haul—Biebel was quoted as saying "we are secure for at least three years unless DeLong does not play the game"—so long as DeLong cooperated. True, Pratt has switched to another brand of media, and a witness for DeLong suggested that DeLong could have won that contract had it bid competitively. But DeLong was at a disadvantage in bidding for the Pratt business since it could not offer Washington Mills media. The jury could have decided that DeLong lost the share of the competitive market which it would have had if it had been able to offer Washington Mills media in the future. No quarrel is had by Washington Mills with the court's repeated instructions to the jury that only losses of business which would have been retained in a competitive market were actionable.

2. Failure to show a conspiracy over resale prices.

Washington Mills argues, as best we fathom, that *Business Electronics* made it abundantly clear that the only vertical restraints deemed to be *per se* illegal under the Sherman Act are agreements relating to resale price, and that the relevant price in the vertical context is "agreement on the price or price levels to be charged by the

remaining dealer." *Business Elecs. Corp.*, 485 U.S. at 726, 108 S.Ct. at 1521. The alleged agreement here, the argument runs, was not to fix the retail price, but to fix the wholesale price of media sold to DeLong, or at best to Pratt. Since there was no showing here of any agreement between Washington Mills and BCS as to the price at which the latter would resell to Pratt, the argument continues, there is no *per se* illegality.

This argument meets the law of the case doctrine head-on. As the *DeLong II* court recognized, all that is required is proof of a fixing of retail price "levels"; this is all that *Business Electronics* addresses, referring to "a further agreement on the price or *price levels* to be charged by the remaining dealer." *Id.*, 485 U.S. at 726, 108 S.Ct. at 1521 (emphasis added). While there was no requirement of adding a "fixed pad" to the price to Pratt, there is no question but what Washington Mills and BCS voluntarily agreed to pad the Pratt price. It will be recalled that Biebel of BCS suggested that BCS and DeLong handle the Georgia Pratt business together, assuring DeLong that there was "plenty of money in it for both of us." When DeLong refused to "play the game," Washington Mills raised the price to DeLong to 85 cents and schemed with BCS so as facially to raise the BCS price to the same amount, while surreptitiously rebating the difference between the 85 cents and the 49.5 cent list price for the same stock media. By fixing the wholesale price level at 85 cents, DeLong or any other distributor would have been required to sell to Pratt at the wholesale price plus expenses and market profits, so that what would result would be the equivalent of resale price maintenance. Price-fixing at the wholesale level, as testified to by a DeLong expert economist, was the mechanism by which the retail price was maintained. The agreement in this case, then, was that future sales by anyone—Washington Mills, BCS, or a duped distributor such as DeLong—would be at the premium price.

In general, of course, the fixing of wholesale prices poses no antitrust problem. *See* 8 Phillip P. Areeda, *Antitrust Law* ¶ 1627 at 316 (1988) ("otherwise, every wholesale price would be illegal—an obviously senseless result"). However, as Areeda notes, complex wholesale price formulae may be the means by which resale price fixing is accomplished, where the formula "so var[ies] the wholesale price in accord with each dealer's resale price as to be the full or substantial functional equivalent of resale price-fixing agreements." *Id.* at 317. *See also id.* ¶ 1627d at 319, *et seq.* As an example of such a functional equivalent retail price fix, Areeda cites *Newberry v. Washington Post Co.*, 438 F.Supp. 470 (D.D.C. 1977), in which a manufacturer raised the wholesale price to a particular dealer by the amount by which the actual retail price exceeded the manufacturer's suggested resale price, thus effectively preventing the dealer from charging more; there, it was significant that the increase was applicable only to one dealer. *Id.* ¶ 1627 at 320-21. Here, to be sure, the wholesale price was not set in response to a dealer's price reduction or increase, but, rather, so as to retain the sweetheart arrangement between the manufacturer and the favored dealer BCS; when DeLong would not comply with the scheme, his dealership was terminated, and, as we read Areeda, he would find this "a vertical price-fixing agreement." *Id.* ¶ 1627 at 321.

To be sure, Areeda recently criticized *DeLong II* as having "adopted an unduly broad concept of what constitutes resale price maintenance." Areeda and Hovenkamp ¶ 1622' at 1049 (Supp. 1991). The supplement's analysis of the *DeLong II* case in this respect is not up to that well-known treatise's customary high standards, however. It refers to the fact that the plaintiff was "allegedly terminated because it frequently called the attention of customers [sic] and others to this fraudulent scheme," a misstatement of fact. The analysis suggests that the defendant (Washington Mills) might be guilty "merely of

successful product differentiation," a far cry from the facts of this case where there was considerable evidence of fraud; or of Robinson-Patman violations "(if the high-priced customer competes with low-price customers)," *id.*, surely not the case here. The supplement then says "[b]ut the supposition of the supplier and the actual charge of higher prices for supposedly premium products do not constitute an agreement setting a resale price . . . ." *Id.* We do not know to which "supposition" the quotation refers, nor do we know how this squares with the analysis in the main volume of wholesale price schemes which operate as the functional equivalent of resale price-fixing. Certainly an agreement is required to present antitrust problems, but here we have one: an agreement between Washington Mills and BCS to inflate all distributors' end price of products destined for one large customer by eliminating price competition at the dealer level. The Areeda supplement describes the supplier and distributor's agreement to divide the excess profits from their fraud-tainted sales as an agreement with "some" of the attributes of a resale price maintenance agreement, but treats the BCS-Washington Mills deal as "no more than the distributor's reward for participating in the fraudulent scheme." *Id.* It was not only a reward, however, but an integral part of the very scheme to inflate prices charged by both dealers, and thus a boon for eliminating distributor competition. While it may generally be true, as Areeda argues both in the supplement and in the main volumes, that the supplier would be better off if the distributor charged less than the agreed-on price, because then it would make even more fraudulent sales, the fact is that in this case the supplier's temporary monopoly position, achieved by fraud and by Pratt's careful approval practices for choosing media, allowed it to reap the benefits as well. This may have been short-sighted, in light of the fact that Pratt now uses another brand of media, but nonetheless Washington Mills evidently chose to combine with one of its dealers to eliminate price com-

petition in the market for media sales to Pratt. We believe that the Areeda supplement analysis overlooks the functional equivalence argument made in the main volume and, as such, does not carry the day with us.

3. Argument that failure of proof of Sherman Act damages mandated a judgment notwithstanding the verdict, not merely a new trial on damages.

The defendants further argue that while the trial court correctly found that the verdict awarding lost profits was based entirely on unsupported assumptions and must be set aside, the appropriate relief should have been the grant of judgment notwithstanding the verdict. *Cf. Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, 670 F.2d 575, 582 (5th Cir.), *cert. denied* 459 U.S. 908, 103 S.Ct. 212, 74 L.Ed.2d 169 (1982) (defendant entitled to directed verdict on Robinson-Patman Act claims because "[s]elf-serving and unsupported assumptions cannot sustain a calculation of going concern value. The burden of putting forth substantial evidence is not satisfied by mere speculation and guess work."). However, as we note in the discussion of the new trial motion, DeLong provided substantial evidence of the damages resulting from its loss of the distributorship and consequent loss of sales and profits, based on evidence of its past performance in the marketplace and not simply on "speculation and guess work." As the Supreme Court has noted, antitrust damages of this sort are difficult to prove, and "it does not ' "come with very good grace" ' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67, 101 S.Ct. 1923, 1929, 68 L.Ed.2d 442 (1981) (quoting *Hetzel v. Baltimore & Ohio R. Co.*, 169 U.S. 26, 39, 18 S.Ct. 255, 260, 42 L.Ed. 648 (1898) (in turn quoting *United States Trust Co. v. O'Brien*, 143 N.Y. 284, 289, 38 N.E. 266 (1894)).

C. *Legal Arguments on the Robinson-Patman Act claim:*

The district court's denial of judgment notwithstanding the verdict on the Robinson-Patman Act claims is unassailable. Section 1 of the Robinson-Patman Act, which of course amends and appears as section 2 of the Clayton Act, 15 U.S.C. § 13 (1988), makes it unlawful for a seller engaged in commerce to discriminate in price between different buyers. This case involves Washington Mills' charging BCS $.495 per pound for the same media it sold to DeLong for $.85 per pound, thereby permitting BCS to sell to Pratt for $.91, below DeLong's retail price of $.97. On the surface, this is discrimination in price. It is not suggested that the statutory defenses of meeting competition or due allowance for differences in cost are available here, and the judicially-created "availability defense" as stated, e.g., in *Shreve Equipment, Inc. v. Clay Equipment Corp.*, 650 F.2d 101, 105 (6th Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 397, 70 L.Ed.2d 213 (1981), is foreclosed by the law of the case under *DeLong II*, 887 F.2d at 1516-17. The only argument seriously advanced here—and to state it makes it appear to border on the ridiculous—is that DeLong and BCS were not in functional or geographic competition with one another, *see, e.g., Parrish v. Cox*, 586 F.2d 9, 11 (6th Cir.1978) (competition must be in same geographical market); *M.C. Manufacturing Co., Inc. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1068 n. 20 (5th Cir.1975), *cert. denied*, 424 U.S. 968, 96 S.Ct. 1466, 47 L.Ed.2d 736 (1976). However, there is no doubt but that both BCS and DeLong were after the same Pratt dollar and, while BCS was primarily a New England distributor and DeLong a southeastern one, both were obviously in head-to-head competition for the Pratt Columbus, Georgia expenditures for jet propeller polishing media, and at corresponding or overlapping time periods. Both were competitors during the startup period for Pratt's Columbus plant beginning in 1983. Deliveries to BCS for fulfilling

the Pratt Georgia orders were initially made to a warehouse in Manchester, Connecticut and transported to Columbus periodically for a year's period during which DeLong, which had begun soliciting business in June of 1983 from Pratt, made only minimal sales to Pratt's relatively nearby new plant. BCS sales to Pratt thus directly competed with potential sales by DeLong. *Cf. Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916, 921 (5th Cir.1962) (competition could be established if plaintiff showed "that it had a substantial stock on hand . . . and that in selling that stock it was in present and active competition with [the defendant]."). Moreover, at least by September 1, 1983, DeLong had been approved as a vendor by Pratt and the subsequent releases of sales under the earlier October contract made by BCS were thus directly competitive with any DeLong sales. True, BCS had no local Georgia warehouse to meet Pratt's 24-hour delivery requirements, but by virtue of its sweetheart price arrangements with Washington Mills it was enabled both to foreclose DeLong from competing in Georgia for a year and to weaken DeLong's long-term position. While there must be two sales made by the same seller to at least two different purchasers at two different prices, *Pierce v. Commercial Warehouse, Div. of Thompson Automotive Warehouse, Inc.*, 876 F.2d 86, 87 (11th Cir.1989) *cert. denied*, 493 U.S. 1045, 110 S.Ct. 841, 107 L.Ed.2d 836 (1990), there is no requirement that the two sales be made at precisely the same time or place. It is sufficient if the complaining party demonstrates some sort of real competitive injury. *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d at 581-82; *M.C. Mfg. Co.*, 517 F.2d at 1065-68. Washington Mills' motion for judgment notwithstanding the verdict on the Robinson-Patman Act claim was properly denied.

Washington Mills also argues that there is no proof of recoverable damages under the Robinson-Patman Act since the jury awarded the exact amount of "commis-

sions" or kickbacks received by BCS, $50,216.25, as damages under the Robinson-Patman Act claim. While this matter will be discussed further in connection with the motion granting a new trial, Washington Mills argues that whatever benefits accrued to BCS did not establish any injury to DeLong. However, this argument conveniently overlooks the fact that DeLong was qualified for approval as a Pratt vendor when the first purchase order let out for bid in late 1983, the October contract, went to BCS because BCS was given the lower $.495 per pound price by Washington Mills and, hence, was able to quote to Pratt a $.91 per pound price while DeLong was unable even to obtain from Washington Mills the necessary product identification for Pratt media.

D. *Motion for Judgment Notwithstanding the Verdict on the Common-Law Fraud Claims:*

Washington Mills argues that there can be no recovery on the common-law fraud claim of deceptive labeling of special media because DeLong's "admitted knowledge of the falsity of the representations negates any finding of reasonable reliance." This argument was addressed in *DeLong II*, 887 F.2d at 1519-20, and, while the law of the case is therefore a complete answer to this argument, the fact is that in reversing the district court's prior dismissal of this claim for lack of justifiable reliance, the *DeLong II* court specifically pointed out that where a plaintiff repeatedly confronts a defendant with the apparent falsity of its representations, and the defendant repeatedly confirms its original statement, asserting special knowledge, reliance is justified. *See Georgia-Carolina Brick & Tile Co. v. Brown*, 153 Ga.App. 747, 755, 266 S.E.2d 531, 539 (1980). Washington Mills argues that at trial Harold DeLong did not testify that he was deceived by the special label or that he relied on Washington Mills' alleged "superior knowledge," but, rather, said that he never believed Washington Mills "from day one." But DeLong's inward lack of belief in

Washington Mills' fraudulent assertions did not demonstrate itself in any external manifestation other than continued questioning, only to be met by continued misrepresentation. We see no need for any further showing of reliance.

Washington Mills points out that the fraud was the sale by Washington Mills of essentially stock media (for which DeLong would normally have been charged $.495 per pound), deceptively labeled as "P & W special" and bearing a premium price of 85 cents. It then goes on to say that, multiplying this extra $.355 per pound by the pounds DeLong actually purchased and resold to Pratt, the total amount comes to $17,824, which, together with $100,000 in punitive damages, was the exact amount awarded by the jury. We find no fault with this judgment, since it appears to be an appropriate award, given a finding of liability.

E. *Washington Mills' appeal of the denial of its motion for a new trial on liability and DeLong's appeal on the grant of a new trial on antitrust damages.*

Washington Mills appeals, in connection with its argument that a new trial should have been awarded on liability, alleged errors in the district court's jury charges. First, on the Sherman Act claim, Washington Mills argues that the district court failed to charge that the jury must find some agreement to fix resale, not merely wholesale, prices; second, on the Robinson-Patman Act claim, that the court failed to charge that recoverable damages must reflect actual loss, if any, to the plaintiff, not just the benefit to the favored customer; and third, on the fraud claim, that the district court erred by charging that the plaintiff could recover the amount of the difference between the price actually charged for so-called P & W specials and the price that otherwise would have prevailed had the material been sold as generic. Each of these points is subsumed either in the arguments as to

liability above or in the arguments as to damages below, and will not be dealt with further here.

DeLong appeals, first, the setting aside of the Sherman Act damage award of $2,033,295 for lost profits, before trebling. Before reaching that verdict, the jury was charged, essentially, to discount Pratt's usage of preformed ceramic abrasive media over the foreseeable future in order to arrive at DeLong's share of that market had DeLong not been terminated as a dealer. The jury verdict was based on the general factual evidence relating to DeLong's past and likely continued success as a dealer, favorable evidence of which was produced by DeLong; Pratt's needs at the Columbus plant; DeLong's willingness to meet price competition and special delivery requirements; DeLong's reputation for technical know-how, testing and delivery capacity, and willingness to work with customers; and DeLong's work history of long-term dealings with Pratt and its other customers. Evidence was adduced to show past loss profits including the amount of Pratt's media usage to the date of trial and its purchase prices. Bud Henry, Pratt's chief media buyer, testified as to Pratt's likely demand for media for 25 years after Pratt's achieving full capacity at its Columbus plant. Scott Thurman, a certified public accountant, provided expert testimony for DeLong in respect to lost profits during Pratt's startup period through its reaching of full capacity in 1994, but concentrating on the computation of factors for inflation and discount to present value. Dr. Bruce Seaman, an economist and professor at Georgia State University, offered alternative projections of lost profits from 1994 forward to 2019, the life of the Columbus plant, and testified to the assumptions underlying the five damage alternatives he presented. The defendants cross-examined the witnesses as to their assumptions, but offered no expert testimony of their own.

The district court, in setting aside the Sherman Act damages verdict, indicated that it was doing so because

the expert projections were based upon the key assumption that "every single pound of Pratt and Whitney's projected media usage to the year 2019 would be Washington Mills media and that every pound of it would be sold by plaintiff." *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, No. 1:86-cv-275-RLV, slip op. at 3 (N.D.Ga. Sept. 30, 1991) (order vacating judgment and, *inter alia*, granting motion for new trial on antitrust damages) ("*DeLong Order*"). This interpretation of the expert testimony, while apparently suggested by Washington Mills' post-judgment brief, does not comport with the testimony. Thurman's testimony that DeLong had suffered a loss of $694,743 in lost sales from 1985 to 1994 started from a base calculation of all sales to the Columbus plant by all manufacturers and distributors, but adjusted profits by assuming a discount of 10% in price, which, as the jury was correctly informed, is the functional and mathematical equivalent of assuming that a significant portion of the Columbus media business would go to other distributors or manufacturers. Thurman's assumption of a discount of sales price by 10% to only 90% of list, amounts to a loss of a third or more of the profit on each individual sale—the substantial equivalent of losing the same proportion of sales. The evidence supports the Thurman calculations, and we find no error that would justify setting aside that portion of the verdict. To be sure, Thurman also offered one estimate of the damages for the entire projection period, through the year 2019, which utilized the constant assumption of this price reduction, and it was apparently on the basis of this assumption that the trial court was led astray. Thurman's calculation produced a figure almost identical to one of Dr. Seaman's five alternative damage scenarios, the one on which the jury settled. However, again, Dr. Seaman presented the jury with five scenarios in which DeLong achieved different degrees of success in the market for the Pratt media business, and the assumptions behind these were based in evidence and subject to cross-examination.

The trial court, in its review of the evidence completed more than a year after the verdict, made certain additional factual assumptions that were simply not the case. These include the following:

First, Thurman did not assume that all media sold to Pratt would be Washington Mills media, except in a pricing sense, that is to say, in his own words he "identified products from Washington Mills' price lists" and used the corresponding prices from those lists to arrive at his own list price assumptions. His method of arriving at sales volume did not attribute all sales to Washington Mills.

Second, the trial court questioned whether Pratt would continue to buy through middlemen as opposed to going directly to the manufacture. True, the media purchaser for Pratt, Bud Henry, testified that Pratt had a "goal" of reducing prices by buying directly, but he did not suggest that all sales categorically would be made directly or that Pratt would ignore the advantages of going through distributors where they outweighed the advantages of direct sales. Pratt did and does in fact use distributors, since servicing capacity and timely delivery were and presumably are of value to the company, and at the time of trial Pratt was buying the bulk of its media through another distributor, not directly. There was ample evidence to indicate that special services were provided by distributors. One could just as well suppose that Pratt could make its own media. Henry himself concluded that there was no reason that DeLong could not have continued indefinitely as one of Pratt's suppliers.

Third, as we have noted, Dr. Seaman examined the case for the lost future profits for 1994-2019 by addressing five alternative models. Despite Washington Mills' and the trial court's claims, he did assume that DeLong was not the only distributor and Washington Mills not the only manufacturer. While he assumed that in the early stages Washington Mills would have had the in-

side track, he also assumed that DeLong would have "made an adjustment" to be "better positioned to maintain the Pratt accounts." He thus chose different levels of competition and different responses to that competition to make his projections. His case one, not in issue here, was a mathematical extrapolation of "maximum damages." This case was based on the assumption that the trial court mistakenly thought all expert testimony rested upon—"that every single pound of Pratt & Whitney's projected media usage to the year 2019 would be Washington Mills media and that every pound of it would be sold by DeLong." *DeLong Order,* slip op. at 3. Case one assumed no retail price discount and no lost sales volume, and projected damages of $5,659,618.

Dr. Seaman's case two adjusted for increased competition and assumed—as had Mr. Thurman in his projections —a 10% retail price discount to protect sales volume, which produced a damage figure of $3,371,865. His case three adjusted for increased competition by assuming that DeLong would continue charging the full retail price but lose 50% of sales volume to other distributors or manufacturers, resulting in a damage figure of $3,177,181. Case four, however, made both adjustments by assuming *both* a 10% retail price discount *and* a 50% loss of sales volume to other distributors or manufacturers, arriving at the figure which the jury apparently accepted, $2,033,295. Dr. Seaman's fifth case consisted of a variation of case four in which the retail price was further reduced from 63 cents to 55 cents, resulting in total damages of $1,468,355. All of the cases, as stated, incorporate Thurman's estimate of lost profits for 1985-94 of $694,743.

The damage figure which the jury selected, Dr. Seaman's case four, then, assumed that DeLong would cut its price to 90% of list in order to meet competition but would still suffer a 50% loss of Pratt sales, and assumed that DeLong would make only one-half of all sales to Pratt with Washington Mills media. It certainly did not assume that "every single pound of Pratt & Whitney's

projected media usage" would be sold by DeLong. We see nothing to indicate that the assumptions made were unreasonable or fanciful.

In sum and substance, the combination of the basic evidence and the testimony of the expert witnesses supported the Sherman Act verdict by providing a basis for the jury to project DeLong's lost profits, assuming different levels of sales volume and profit per sale, and utilizing a discount factor reflecting all of these other potential sales. *See J. Truett Payne,* 451 U.S. at 565-67, 101 S.Ct. at 1929 (1980); *Copper Liquor, Inc. v. Adolph Coors Co.,* 624 F.2d 575, 580-81 (5th Cir.1980). We think the assumptions used here were reasonable in light of the evidence.

Alternatively, Washington Mills argues that Dr. Seaman's case four assumption that DeLong would have captured half of the Pratt business to the year 2019 is subject to the same fundamental fallacies as Thurman's theory of damages through 1994, namely, that there is no more basis for assuming that DeLong would have had one-half of Pratt's future business but for the termination than there is for assuming that it would have captured it at all. But the damages proof here reduced DeLong's potential sales volume to show loss of profits in open competition, and the jury verdict, to the extent it rested on Dr. Seaman's case number four, also incorporated a second adjustment assuming sales at a 90% discount off list price. We are basically dealing with a hypothetical question, in any event: what would have occurred if the defendants had not violated the antitrust laws and terminated DeLong's distributorship? *See Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123-24, 89 S.Ct. 1562, 1576-77, 23 L.Ed.2d 129 (1969); *Malcolm v. Marathon Oil Co.,* 642 F.2d 845, 858-59 & n. 24 (5th Cir. Unit B 1981), *cert. denied,* 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981); and *Lehrman v. Gulf Oil Corp.,* 464 F.2d 26, 46-47 (5th Cir.), *cert. denied,* 409 U.S. 1077, 93 S.Ct. 687, 34

L.Ed.2d 665 (1972). On the strength of the overall evidence, exclusive of the mathematical and economic projections, the jury properly could have concluded that DeLong would have continued to sell to Pratt on the basis of the advantages of the Washington Mills product and DeLong's superior servicing and delivery capacity. The fact that Washington Mills has in fact lost the Pratt media business to another manufacturer is, at most, an indication that its overcharging and fraud preempted its participation in future sales.

In sum, because the district court's grant of a new trial, in a 5-page order filed more than a year after the close of trial, was based on a misreading of the evidence, the court abused its discretion in discarding the jury's verdict.

DeLong also appeals the grant of a new trial on the Robinson-Patman Act damages, arguing that the jury's award of $50,216.15 should be reinstated. This sum, as we have said, is identical to the amount of kickbacks which BCS received for DeLong's sales of media to Pratt. The district court granted a new trial on these damages because it concluded that the jury had latched onto this figure despite the fact that "Robinson-Patman damages must be measured by what the disfavored buyer suffered, not by what the favored buyer gained." *DeLong Order*, slip op. at 4. *See also J. Truett Payne*, 451 U.S. at 568, 101 S.Ct. at 1930 (must prove injury from price discrimination as well as fact of price discrimination in order to recover under Robinson-Patman Act), *and id. on remand*, 670 F.2d 575, 583 (concluding that there was insufficient evidence of damages).

Washington Mills defends the grant of a new trial on the theory that the *J. Truett Payne* cases, and *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir.1988), *aff'd*, 496 U.S. 543, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990), bar the award of "automatic damages" in Robinson-Patman cases, and that the jury in this case has awarded

just such automatic damages by reasoning that the benefit to BCS should be the measure of the Robinson-Patman award. However, the cases actually say something much narrower: that it is impermissible to assume, from evidence of price discrimination, that the plaintiff suffered antitrust injury. While we certainly agree that the appropriate measure of DeLong's damages should be the extent of DeLong's injury, and not the extent of BCS's gain, we note that these sums may be related. It may be that the extra money paid to BCS corresponded, at least roughly, to DeLong's lost profits on sales made of the media for which it was overcharged and on sales lost to BCS, and to other damage resulting from the drain on DeLong's business of competing with a distributor receiving favorable prices. Although DeLong still was able to make a profit on the sales it did make to Pratt, the Supreme Court has made clear that passing on the increased price does not prevent a middleman from collecting Robinson-Patman Act damages. *Kansas and Missouri, et. al. v. Utilicorp United, Inc.*, 497 U.S. 199, 110 S.Ct. 2807, 111 L.Ed.2d 169 (1990); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968); *see also Austin v. Blue Cross and Blue Shield of Ala.*, 903 F.2d 1385 (11th Cir.1990).

Nonetheless, we do not think it was error for the court to have concluded that the jury's award indicated that it had misunderstood or misapplied the law of Robinson-Patman Act damages by focusing not on the injury to DeLong but on the benefit to BCS. Nor did the trial court make any factual errors in setting aside the Robinson-Patman Act damages. While this is not a case in which the amount of the damages award was outside of the range of permissible verdicts, *see* 11 Wright and Miller § 2820, there are other circumstances in which a new trial may be awarded. In particular, where the verdict suggests that the jury was confused and misapplied the law, it is

not an abuse of discretion to grant a new trial. *E.g., Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 849 (D.C.Cir.1981), *cert. denied*, 455 U.S. 994, 102 S.Ct. 1622, 71 L.Ed.2d 855 (1982); *Wood v. Holiday Inns, Inc.*, 508 F.2d 167, 175 (5th Cir.1975). While we think it conceivable that the jury viewed the kickbacks as a likely minimum measure of DeLong's damages as a result of the price discrimination, we think the district court was in a better position to determine whether the verdict in fact was the product of confusion. In addition to the verdict itself, the judge might have considered the possibility that the jury was distracted by the much larger Sherman Act damages claim and confused by the comparative weakness of the instructions he gave for calculating Robinson-Patman damages. The judge admonished the jury generally that recovery on all antitrust claims should be for injury to the plaintiff's business, but he offered no specific instructions for calculating the Robinson-Patman Act damages. Indeed, the district court's only explicit statement to the jury on the subject was the following:

> Now, in calculating or figuring the measure of damages for price discrimination, one way that you might do that is this: The plaintiff would be entitled to recover the difference in the price of the product—strike that, that's not what I want to charge there.

In part because of this misstatement, Washington Mills sought a specific jury charge that DeLong could recover only in the amount of its own injury from the price discrimination, and not in the amount of BCS's gain. The court rejected this suggestion on the theory that the general admonition covered the point. He might have recalled, too, that DeLong's lawyers had advised the jury during closing argument that DeLong's injury, and not BCS's gain, was the appropriate measure of Robinson-Patman damages. Nonetheless, we cannot say that it was

error to conclude, once the jury returned a verdict in the precise sum of the paybacks to BCS, that the jury had chosen this figure for impermissible reasons. Accordingly, we affirm the grant of a new trial on the Robinson-Patman damages.

Finally, the trial court did not err in allowing pre-judgment interest on Washington Mills' counterclaim on DeLong's open account. DeLong admitted owing the $24,532.68 amount awarded, and, hence, it is a liquidated sum within the meaning of Georgia law. *Council v. Hixon,* 11 Ga. App. 818, 827, 76 S.E. 603 (1912). Under Georgia law, if a party admits liability in some amount, not necessarily the amount claimed or ultimately recovered by the other party, interest may be had from the date of such admission on that amount. *See Boston-Old Colony Ins. Co. v. Warr,* 127 Ga.App. 364, 364, 193 S.E.2d 624, 625 (1972); *Walton Motor Sales, Inc. v. Ross,* 736 F.2d 1449, 1459 n. 20 (11th Cir.1984) (applying Georgia law).

CONCLUSION

The judgment of the district court insofar as it denied Washington Mills' motions for judgment notwithstanding the verdict is affirmed. The judgment insofar as it granted the motion for a new trial on Sherman Act damages is reversed, and on Robinson-Patman Act damages is affirmed. The judgment awarding pre-judgment interest on the counterclaim for open account indebtedness is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:86-cv-275-RLV

DELONG EQUIPMENT COMPANY,
Plaintiff,

vs.

WASHINGTON MILLS ELECTRO MINERALS CORP., f/k/a WASHINGTON MILLS ABRASIVE CO.; WASHINGTON MILLS CERAMIC CORP., JOHN T. WILLIAMS, and PETER WILLIAMS,
Defendants.

ORDER

[Filed Sep. 30, 1991]

This action for violation of section 1 of the Sherman Act, 15 U.S.C. § 1, section 2 of the Clayton Act, as amended by section 1 of the Robinson-Patman Act, 15 U.S.C. § 13(a), and state common law fraud was tried before a jury, and the jury returned a verdict for the plaintiff on all three counts. The jury awarded $2,033,295.00 under Count One, $50,216.15 under Count Two, and $117,824.00 under Count Three (on the latter amount $100,000.00 was awarded as punitive damages). In a judgment entered on September 20, 1990, the court trebled the damages awarded under Count One and Count Two of the complaint. Pending before the court are the plaintiff's motion to alter or amend judgment to included pre-judgment interest, the plaintiff's motion to alter or amend judgment on the

counterclaim to eliminate pre-judgment interest, and the defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

The court has carefully considered the numerous, voluminous filings of the parties and concludes that there is no legal basis for setting aside the jury's verdict with respect to the defendants' liability on any of the three counts. Consequently, the defendants' motion for judgment notwithstanding the verdict is DENIED. Furthermore, although the court finds no basis for setting aside the amount of damages awarded under Count Three (state common law fraud), the court concludes that the evidence does not support the amount of damages awarded under Count One (Sherman Act) and Count Two (Robinson-Patman). For the reasons given below, the court hereby SETS ASIDE the jury's award of damages under Count One and Count Two and GRANTS the defendants' motion for new trial; however, the court will not set aside the jury's finding of liability under Count One and Count Two, and the new trial will be restricted to the amount of damages to be awarded under these counts. Because the court will conduct a new trial on the issue of damages, the plaintiff's motion to alter or amend the judgment to include pre-judgment interest is DENIED as MOOT.

The jury verdict of $2,033,295.00 on the Sherman Act claim was based entirely on the testimony of the plaintiff's two experts—Scott Thurman, an accountant, and Dr. Bruce Seaman, an economist. These two witnesses constructed a hypothetical stream of earnings, beginning with the date of the plaintiff's termination as a Washington Mills distributor in August 1985, and extending all the way to the year 2019. The verdict based upon this evidence was fatally flawed in that the assumptions utilized by the experts in arriving at their conclusions were speculative and, in some cases, directly contrary to the undisputed evidence in the case.

Mr. Thurman testified that his projection of "lost profits" were founded on several fundamental assumptions, including (1) that Washington Mills would continue to be the sole source of media used by Pratt & Whitney, (2) that Pratt & Whitney would continue to buy through middlemen, as opposed to going direct, and (3) that the plaintiff would be the distributor that got all of the business. In other words, Mr. Thurman's damage calculations assumed that every single pound of Pratt & Whitney's projected media usage to the year 2019 would be Washington Mills media and that every pound of it would be sold by the plaintiff.

Although Washington Mills had originally been the sole approved source for the original media types used by Pratt & Whitney during the start-up phase of its Columbus, Georgia, plant, Mr. Ray Barber of Pratt & Whitney testified that the odds of Washington Mills remaining the sole source of Pratt & Whitney's media needs for any extended period of time into the future was about "minus zero." The evidence was clear that Pratt & Whitney's intent from the start had been to introduce multiple sources for its media usage; indeed, at the time of trial there were four different manufacturers already approved to supply the media, with additional manufacturers being under study.

With regard to the assumption that Pratt & Whitney would continue to purchase through middlemen, the undercontradicted evidence of the plaintiff's own witnesses was that Pratt & Whitney's desire was, and always had been, to buy direct from the manufacturer whenever possible.

With regard to the assumption that the plaintiff would continue to be the distributor that would capture all sales to Pratt & Whitney to the year 2019, the undisputed evidence was that the plaintiff had already lost out to another distributor, Bradley Supply, in competitive bidding even prior to being terminated by Washington Mills.

Because the basic assumptions made by the plaintiff's damage experts are unsupported, or even contradicted, by the evidence in the record, the court finds that there is no basis for the amount of Sherman Act damages awarded by the jury and that a new trial on the issue of such damages is necessary.

With respect to the plaintiff's Robinson-Patman claim, the amount of damages awarded by the jury was simply the amount of over-ride commissions paid by Washington Mills to B.C.S. Company, another distributor of Washington Mills products. However, Robinson-Patman damages must be measured by what the disfavored buyer suffered, not by what the favored buyer gained. Indeed, counsel for the plaintiff in his closing argument noted that the $50,216.25 figure was the amount of commissions received by B.C.S. but further noted that it could not be a proper measure of damages:

> [I]t is clear that the [Robinson-Patman] damages are not simply the price difference. They can be more, they can be less. . . . But the damages, for example, cannot be simply $50,216.25. That's the price difference. That's the discrimination in price, but those aren't the damages.

Because there is no method by which this precise amount of Robinson-Patman damages could be calculated other than utilizing the over-ride commissions and because that is not the proper measure of such damages, this court concludes that the jury utilized an improper measure of Robinson-Patman damages and that that award of damages, therefore, must be set aside.

The court has considered the plaintiff's argument regarding the pre-judgment interest awarded on the counterclaim and finds those arguments to be without merit. Consequently, the plaintiff's motion to alter or amend the judgment to set aside the award of pre-judgment interest is DENIED.

In summary, the court's judgment dated September 20, 1990, and entered on the docket on September 21, 1990, is hereby VACATED. The plaintiff's motion to alter or amend judgment on the counterclaim to eliminate pre-judgment interest is DENIED; the defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial is GRANTED to the extent that the court hereby orders a new trial with respect to the damages to be awarded under Count One and Count Two of the complaint but is in all other respects DENIED; the plaintiff's motion to alter or amend the judgment to include pre-judgment interest is DENIED as MOOT.

SO ORDERED, this 30th day of September, 1991.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:86-cv-275-RLV

DELONG EQUIPMENT COMPANY,
Plaintiff,

vs.

WASHINGTON MILLS ELECTRO MINERALS CORP., f/k/a WASHINGTON MILLS ABRASIVE CO., WASHINGTON MILLS CERAMIC CORP., JOHN T. WILLIAMS and PETER WILLIAMS,
Defendants.

JUDGMENT

[Filed Sep. 20, 1990]

This matter having come before the court and a jury for consideration, the jury rendered the following verdict: (1) for the plaintiff, DeLong Equipment Company, and against the defendant in the sum of $2,033,295.00, on the plaintiff's price-fixing claim under 15 U.S.C. § 1; (2) for the plaintiff, DeLong Equipment Company, and against the defendants in the sum of $50,216.25, on the plaintiff's price discrimination claim under 15 U.S.C. § 13(a); and for the plaintiff, DeLong Equipment Company, and against the defendants in the sum of $17,824.00 as compensatory damages and $100,000 as punitive damages on the plaintiff's fraud claim.

At the close of the evidence the court, on motion by the defendants, directed that a verdict in the amount of $24,532.68 be entered in favor of defendant Washington Electro Minerals Corp. and against DeLong Equipment Company.

Therefore, judgment is hereby entered for plaintiff, DeLong Equipment company, and against the defendants, Washington Electro Minerals Corp. f/k/a Washington Mills Abrasive Co., Washington Mills Ceramic Corp., John T. Williams, and Peter Williams, in the sum of $6,099,885.00 on the 15 U.S.C. § 1 claim; $150,648.75 on the 15 U.S.C. § 13(a) claim; and $17,824.00 as compensatory damages and $100,000 as punitive damages on the fraud claim. These sums will accrue interest at the rate of 7.95 percent per annum from the date of the judgment until paid.

Further, judgment is hereby entered for the defendant Washington Mills Abrasive Co. against the plaintiff, DeLong Equipment Company, in the sum of $24,532.68 plus pre-judgment interest thereon at the rate of 18 percent per annum from October 30, 1985, until the date of this judgment. These sums will accrue interest at the rate of 7.95 percent per annum from the date of the judgment until paid.

The parties will bear their own costs.

This 20th day of September, 1990.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 88-8664

DELONG EQUIPMENT COMPANY,
Plaintiff-Appellant,

v.

WASHINGTON MILLS ABRASIVE COMPANY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

Nov. 13, 1989

Before VANCE and ANDERSON, Circuit Judges, and ATKINS *, Senior District Judge.

ANDERSON, Circuit Judge:

Plaintiff-appellant DeLong Equipment Company ("DeLong") brought this action against Washington Mills Abrasive Company, its wholly-owned subsidiary Washington Mills Ceramic Corporation (collectively referred to as "Washington Mills" unless otherwise noted), B.C.S. Company, Inc. ("BCS"), and several individuals alleging

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

violations of the federal antitrust laws as well as pendent state law claims. The district court granted partial summary judgment in favor of the defendants, and DeLong appeals. Because we find that DeLong has raised genuine issues of material fact regarding several issues, we reverse and remand the case for trial.

I. BACKGROUND

A. *Facts*

Plaintiff DeLong, a Georgia corporation wholly owned by Harold DeLong, is a distributor of vibratory equipment and supplies used to polish and deburr metal parts in industrial manufacturing processes. The key product in this process is an abrasive metal finishing substance known as "media." In the manufacturing process, metal parts for products such as automobiles or airplanes are cut from sheets of metal and placed in vats or tubs containing media. The containers are then vibrated, causing the media to rub against the metal parts, removing any rough edges and giving the piece a polished finish.

Finishing media can be readily available natural products such as corn cobs or sand, or can be specialized products such as liquid chemicals, glass beads, steel balls, ceramic shapes, or plastic chips. The media in this case is known as "preformed ceramic media," and is used, among other things, in the manufacture and refurbishing of jet aircraft engine blades. Preformed ceramic media consists of a blend of clays, sands, and polishing agents which is extruded through metal molds of different shapes, such as cylinders, stars, rectangles, or triangles, cut into the desired size, baked and dried. The material is packed by the manufacturer and shipped either to distributors or directly to end-user customers by common carrier. The role of the distributor is to consult with the user of media and to advise the user of the appropriate equipment, media, vibratory power, speed, and time period.

Washington Mills Abrasive Company, located in North Grafton, Massachusetts, has been in the abrasive finishing business since 1868. Washington Mills is a manufacturer-supplier and occasional distributor of media.[1] Washington Mills's media is manufactured by its wholly-owned subsidiary, Washington Mills Ceramic Corporation, located in Lake Wales, Florida. Washington Mills approved DeLong as a distributor in September 1982.[2]

Defendant BCS, located in Thompson, Connecticut, is also a distributor of media, engaged in a business virtually identical to DeLong's. BCS has been a distributor of Washington Mills products since the early 1980s, and was Washington Mills's primary distributor in the northeast during all times relevant to this litigation.[3] Neither DeLong nor BCS manufacture media, but both distribute media manufactured by others, including Washington Mills.

As was its customary practice, Washington Mills did not enter into a written distributorship agreement with DeLong. Generally, Washington Mills distributors purchased media for resale at a wholesale discount of 25% off the list price for media. There was no provision in the arrangement between Washington Mills and DeLong for exclusive territories or franchise areas, and Washington Mills's distributors competed, sometimes vigorously, for end-user customer accounts. As a distributor of Washington Mills products, DeLong, along with all other Washington Mills distributors, received a standard price list

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[1] Washington Mills sells its media primarily through its network of distributors. It does sell some media directly to end-user customers, but it is undisputed that such sales occurred only infrequently and outside Washington Mills's usual course of business during times relevant to this litigation.

[2] DeLong has been engaged in the sale and distribution of vibratory equipment and media for over twenty years, primarily in Georgia, Alabama, and South Carolina.

[3] BCS was dismissed as a party to this action after settlement.

showing the size, shape, composition, and price per pound for each kind of "stock" media regularly kept in Washington Mill's inventory. The price list also provided that customers could request specially made media, subject to minimum volume requirements and a requirement that the customer pay for a new die if one was required to produce the media. This "special" media was manufactured at the request of three or fewer customers without sufficient volume to be placed in regular inventory. "Special" media is not an inherently different product from Washington Mill's "stock" media or from media manufactured by other companies.

Defendant Peter Williams is the president and controlling shareholder of Washington Mills. Defendant John Williams, no relation to Peter, is general sales manager of Washington Mills as well as an officer of the corporation. Defendant Hans van der Sande was Washington Mills's southeast regional sales manager [4] during the time material to this action. He was responsible for processing orders and arranging shipments to distributors, and also dealt with distributor complaints. Defendant Robert Baldauf was regional sales representative for Washington Mills in the southeast. Baldauf visited dealers, ascertained their product needs, and transmitted this information to van der Sande at Washington Mills's home office.

Pratt & Whitney Aircraft Division of United Technologies Corporation ("Pratt") is not a party to this action, but its role has been crucial throughout. Pratt is one of Washington Mills's largest end-user customers. Pratt manufactures aircraft engines, and ceramic performed media are used in the production of jet engine blades. Pratt's engineering department tests and approves the use of certain materials in its manufacturing process and is-

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[4] Florida, Georgia, Alabama, Mississippi, Tennessee, North Carolina, South Carolina, and eastern Arkansas comprised Washington Mills's southeast sales region.

sues specifications used by its purchasing department in soliciting bids for these products. These specifications appear on product material control dockets, or "PMCs." Except for extraordinary situations not relevant here, Pratt's purchasing department may only purchase items specified on the PMCs, and materials delivered to Pratt must have the PMC number stamped on the box. PMCs are important to Pratt because it wants to ensure that both the product which was tested and the supplier of that product remain constant. Pratt considers the PMC number an attestation that the product is identical to the product that Pratt approved for its manufacturing process. Pratt not only buys media for its manufacturing of jet engine blades, but also instructs other companies purchasing Pratt engines to use the same media in refurbishing engine blades.

In the late 1970s and early 1980s, Pratt was planning a new production facility. Initially the facility was to be located in the northeast, but Pratt ultimately built the plant in Columbus, Georgia in 1983. In the years preceding Pratt's construction of its Columbus facility, Pratt engineers in Connecticut had engaged in a business relationship with BCS. BCS was a supplier of tumbling media and other products to Pratt's East Hartford, Connecticut plant at that time. Defendants William Biebel and his son, Robert Biebel, were the principals of BCS who dealt with Pratt's engineers. During Pratt's development process of a new jet engine to be manufactured in Georgia, BCS helped Pratt test vibratory equipment and tumbling media until a satisfactory process was found. After testing media from several manufacturers, including Washington Mills, James Neil, a Pratt engineer, requested that a PMC be issued for three of the Washington Mills media furnished by BCS during the development process.

This PMC specified BCS as the "manufacturer" of the media, and identified various media as "BCS Specials."

William Biebel of BCS testified that BCS tried to have an end-user customer approve a product with the BCS label rather than the manufacturer's label. This labeling ensured that BCS would retain the sales of the product and not be undercut by a competing distributor of the same media.

Initially, Washington Mills distributed its media to Pratt's Columbus plant through BCS. Pratt required a twenty-four hour commitment for delivery to the Columbus plant, however, and BCS did not have facilities nearby to service the plant properly. When it became aware of BCS's inability to service Pratt in Columbus, DeLong became attracted to the lucrative account.

DeLong received an invitation to bid in 1982 which listed BCS as the manufacturer of the media, and DeLong informed Pratt that BCS did not manufacture media but was a distributor like DeLong. Harold DeLong asked for a sample of the media in question, and his examination of the media suggested that it was stock media manufactured by Washington Mills. DeLong repeatedly complained to Washington Mills that the higher priced media being sold to Pratt was exactly the same as Washington Mills's stock media, and that therefore the price should have been lower.

DeLong made a bid in response to Pratt's 1982 invitation, and was the successful bidder. DeLong leased a warehouse in Columbus, and supplied Washington Mills's media to Pratt until Washington Mills terminated its distributorship in August 1985.

B. *Procedural History*

After being terminated by Washington Mills, DeLong brought this action in February 1986, alleging violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; section 2 of the Clayton Act as amended by section 1 of the Robinson-Patman Act, 15 U.S.C. § 13(a); sec-

tion 3 of the Clayton Act, 15 U.S.C. § 14; and various violations of Georgia law, including breach of contract, tortious interference with business relationships, fraud, deceit, and misrepresentation.

In its complaint, DeLong alleged, *inter alia*, that it was terminated for failing to participate in a scheme between Washington Mills and BCS to fix the price of media, particularly media sold to Pratt. Washington Mills asserted that it terminated DeLong's distributorship because DeLong's employees were abusive to Washington Mills personnel and DeLong was behind in its payments. DeLong also alleged that after it was terminated by Washington Mills, Washington Mills used customer lists and other information to attempt to dissuade DeLong customers from continuing to deal with DeLong.[5] DeLong's customer lists were available to Washington Mills because shipments from Washington Mills's manufacturing site in Lake Wales, Florida, were "drop shipped" directly to DeLong's customers.

The district court dismissed defendants Robert Biebel, William Biebel, and BCS for lack of personal jurisdiction. This court affirmed the dismissal of William, but reversed the dismissal of Robert and BCS. *DeLong Equipment Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843 (11th Cir.1988). On remand after extensive discovery, the district court granted the remaining defendants' motion for summary judgment on all counts except some aspects of DeLong's Robinson-Patman Act count. *DeLong Equipment Co. v. Washington Mills Abrasive Co.*, No. 1:86-CV-275-GET (N.D.Ga. June 16, 1988) ("District Court Order"). The district court certified its grant of summary judgment under Fed.R.Civ.P. 54(b), and this appeal followed.

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[5] The parties have entered into court-approved protective orders to protect confidential customer information in this litigation.

C. *Standard of Review*

This court reviews the district court's grant of summary judgment *de novo*. *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1492-93 (11th Cir.1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 2110, 104 L.Ed.2d 670 (1989). Summary judgment is appropriate only if the pleadings and evidence in the record demonstrate that there is no genuine issue of material fact as to any issue and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). On summary judgment, the reasonable inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538 (1986), *quoting United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962). The nonmoving party, however, "must present affirmative evidence in order to defeat a properly supported motion for summary judgment," *Anderson*, 477 U.S. at 257, 106 S.Ct. at 2514, and must show "that there is a genuine issue for trial." *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356; *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1579 (11th Cir.1988).

It is the substantive law, however, that identifies those facts that are material. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510. The Supreme Court recently has endorsed the use of summary judgment in antitrust cases in order to avoid chilling legitimate competitive behavior, *Matsushita*, 475 U.S. at 594, 106 S.Ct. at 1360; *McGahee*, 858 F.2d at 1493, and has articulated specific rules which make summary judgment more readily available in cases alleging violations of section 1 of the Sherman Act. *H.L. Hayden Co. of New York v. Siemens Medical Systems*, 879 F.2d 1005, 1012 (2d Cir.1989). We address those rules more fully in the context of our discussion of DeLong's section 1 claim.

II. SHERMAN ACT CLAIMS

A. *Applicable Law*

The first count in DeLong's complaint alleges a conspiracy in violation of section 1 of the Sherman Act.[6] DeLong contends (1) that the defendants conspired to fix prices of media sold to Pratt by designating ordinary media as "special" media and selling it at an artificially inflated price to Pratt; and (2) that DeLong's distributor relationship with Washington Mills was terminated in furtherance of that conspiracy.

Restraints on competition that may violate section 1 fall into two broad categories, horizontal and vertical. Vertical restraints occur between entities at different levels of distribution in order to control the price or path of a product after the product leaves the manufacturer, while restraints between competitors at the same level of distribution are characterized as horizontal. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, ——, 108 S.Ct. 1515, 1522-23, 99 L.Ed.2d 808 (1988). While the boundary between vertical and horizontal restraints is sometimes unclear, *see Business Electronics*, 485 U.S. at —— n. 4, 108 S.Ct. at 1528 n. 4 (Stevens, J., dissenting), it is undisputed that the termination of DeLong, a distributor, by Washington Mills, a manufacturer, poses a vertical restraint problem. District Court Order 10; *Valley Liquors v. Renfield Importers*, 822 F.2d 656, 660 n. 5 (7th Cir.) ("[a]lleged price fixing between a manufacturer and distributors [is] properly termed a

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[6] Section 1 of the Sherman Act, in pertinent part, provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

DeLong also alleged violations of section 2 of the Sherman Act and section 3 of the Clayton Act. The district court granted summary judgment in favor of the defendants on these claims, and DeLong has not contested that ruling on appeal.

'vertical' conspiracy"), *cert. denied,* 484 U.S. 977, 108 S.Ct. 488, 98 L.Ed.2d 486 (1987); *see Construction Aggregate Transport v. Florida Rock Industries,* 710 F.2d 752, 778 (11th Cir.1983) ("key inquiry when determining whether a particular arrangement is horizontal or vertical is not the presence of a conspirator on the plaintiff's market level ('horizontal' to the plaintiff) but whether the conspiratorial agreement is *between* entities which are *horizontally arranged* at some level in the market") (emphasis in original) (footnote omitted).[7]

Vertical restraints may be price or non-price in nature. Supreme Court decisions from *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911), to *Business Electronics* have left the area of vertical price restraints relatively settled. Express agreements or practices implying an agreement to maintain resale prices are *per se* illegal under section 1 of the Sherman Act. As the Court recently reaffirmed in *Business Electronics,* "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." 485 U.S. at ——, 108 S.Ct. at 1525.

Per se rules of illegality are the exception in antitrust analysis and are appropriate only when they relate to conduct that is manifestly anticompetitive. *Business Electronics,* 485 U.S. at ——, 108 S.Ct. at 1519. As the Court explained in *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958), "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Since the

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[7] The Supreme Court has expressly rejected the possibility, suggested by DeLong, that this vertical conduct can be construed as horizontal because some of its effects may be horizontal. *Business Electronics,* 485 U.S. at ——, 108 S.Ct. at 1523 n. 4.

Court decided *Dr. Miles* in 1911, vertical price agreements have been deemed to have such a pernicious effect on competition that *per se* illegality is warranted.[8]

The Court in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 760-61, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984), set forth the legal standard governing distributor termination cases:

> This Court has drawn two important distinctions that are at the center of this and any other distributor-termination case. First, there is the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a 'contract, combination . . . or conspiracy' between the manufacturer and other distributors in order to establish a violation. 15 U.S.C. § 1. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919); cf. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960). Under *Colgate* the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.

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[8] Recent vertical restraint decisions indicate that the Supreme Court now requires a higher threshold of proof of joint action in a vertical price fixing case in order to invoke *per se* illegality, not a relaxation of the settled rule that vertical price agreements are *per se illegal. Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 760-61, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984) (reaffirming rule that vertical price restraints are *per se* illegal while non-price restrictions are subject to the rule of reason).

> The second important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on nonprice restrictions. The former have been *per se* illegal since the early years of national antitrust enforcement. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404-409, 31 S.Ct. 376, 383-385, 55 L.Ed. 502 (1911). The latter are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

465 US. at 760-61, 104 S.Ct. at 1469 (footnote omitted).

Under the rule of reason, the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. *GTE*, 433 U.S. at 49, 97 S.Ct. at 2557. The burden of proving unreasonable effects on competition in a rule of reason case rests with the antitrust plaintiff. *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 380 (5th Cir.1977).[9] Among other things, this means that the plaintiff must allege and prove that the defendants' conduct had a significant anticompetitive effect in a defined product market. *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 422-23 (11th Cir.1984); *Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560, 1573 (11th Cir.1983); *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 571 (5th Cir.1978), *cert. denied*, 440 U.S. 909, 99 S.Ct. 1218, 59 L.Ed.2d 457 (1979).

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[9] This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

The district court concluded that the restraints at issue here were non-price in nature, and hence applied a rule of reason analysis. District Court Order 10-11. The court misconceived DeLong's position and focused on the indirect effect on price which the termination of the DeLong distributorship may have had. The court, applying the rule of reason, held that DeLong had not carried its burden of defining a relevant market and granted summary judgment to defendants accordingly. On appeal, DeLong candidly concedes that it has not alleged and cannot prove the facts required to establish a prima facie rule of reason case under the law of this circuit.[10]

In order for DeLong to prevail on this appeal, then, it must demonstrate that genuine issues of material fact exist as to vertical price agreements which would be *per se* illegal under section 1. We believe that the district court's conclusion that the alleged restraints were non-price in nature overlooked evidence of a conspiracy to

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[10] DeLong attempts to circumvent the factual showing of market power and diminution of competition required under the rule of reason by citing *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984). Once an antitrust plaintiff has adduced evidence demonstrating defendants' imposition of price restraints, according to DeLong, *NCAA* stands for the proposition that the defendants must come forth with "some competitive justification even in the absence of a detailed market analysis." 468 U.S. at 109-10 n. 42, 104 S.Ct. at 2964-65 n. 42. Under this interpretation of *NCAA*, DeLong contends that because it has shown a "naked restriction on price" within the meaning of *NCAA*, it is not required to adduce evidence of market power.

This is a tortured reading of *NCAA*. In *NCAA*, the fact that the NCAA possessed power in the collegiate sports television market was obvious. The thrust of the Court's discussion upon which DeLong relies is actually to the effect that where "[a]s a factual matter, it is evident that petitioner does possess market power," 468 U.S. at 111, 104 S.Ct. at 2965, a lengthy economic analysis of market power is unnecessary. DeLong has made no showing that Washington Mills's market power, if any, is "evident" and therefore DeLong's argument based on *NCAA* is without merit.

fix the price of media sold to Pratt; we conclude that DeLong has presented sufficient evidence of a vertical *price* conspiracy to survive defendants' motion for summary judgment.[11] DeLong has presented substantial evidence, creating genuine issues of material fact, of a conspiracy to fix the price of media sold to Pratt and termination of DeLong's distributorship pursuant to the conspiracy.[12] We now turn to that evidence.

B. *DeLong's Allegations of a Vertical Price Conspiracy*

In order to survive the defendants' motion for summary judgment, DeLong must adduce facts that tend to show a conspiracy to set prices and that DeLong was terminated pursuant to that conspiracy.[13] Antitrust law,

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[11] A conspiracy to artifically inflate or "pad" the price is a conspiracy to affect "price or price levels." *Business Electronics*, 485 U.S. at ——, 108 S.Ct. at 1525; *County of Oakland v. City of Detroit*, 866 F.2d 839, 841, 850 (6th Cir.1989); *National Marine Electronic Distributors v. Raytheon Co.*, 778 F.2d 190, 193 (4th Cir. 1985) (in order to conspire to restrain resale price competition there must be "some agreement to set, control, fix, maintain, or stabilize prices"). Washington Mills does not argue otherwise.

[12] DeLong also alleged that Washington Mills illegally divided market territories and specific customers among its distributors, and that DeLong's failure to respect those divisions was another factor leading to its termination in August 1985. Territorial restrictions, *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 422 n. 13 (11th Cir.1984), and exclusive dealing arrangements, *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 711 (11th Cir.1984), are nonprice vertical restraints and therefore reviewed under the rule of reason. *GTE*, 433 U.S. at 49, 97 S.Ct. at 2557. Because DeLong concedes that its evidence is insufficient to sustain rule of reason scrutiny, *see supra*, we need not address these contentions.

[13] The district court assumed for summary judgment purposes, but did not decide, that DeLong presented sufficient evidence of joint action. District Court Order 10. It did not need to reach the issue of whether a vertical agreement existed because it characterized the restraints at issue as nonprice in nature and therefore

however, "limits the range of permissible inferences from ambiguous evidence" in a case under section 1 of the Sherman Act. *Palmer v. BRG of Georgia, Inc.*, 874 F.2d 1417, 1422 (11th Cir.1989). In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), the Court set forth the standard by which to judge the sufficiency of the evidence of an agreement to restrain trade in a dealer termination case:

> [T]here must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

465 U.S. at 768, 104 S.Ct. at 1473. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), the Court held that a non-moving party who seeks to defeat a summary judgment motion "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed" the non-moving party. 475 U.S. at 588, 106 S.Ct. at 1356-57. The summary judgment standard in vertical restraint cases is more stringent than in other areas of antitrust law because a higher possibility of capturing and invalidating legitimate business conduct exists. In *Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530 (11th Cir.1987), this court combined the *Monsanto* and *Matsushita* rules into a two-part test applicable to distributor termination cases where the plaintiff alleges that it was terminated due to

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applied a rule of reason analysis. Because we believe that the restraints at issue are more appropriately characterized as vertical *price* restraints, *see supra*, we must address the question whether DeLong has presented sufficient evidence of conspiracy to survive a motion for summary judgment.

a collusive price-fixing agreement between a manufacturer and its distributors:

> First, the plaintiff must satisfy the court that the conspiracy which he alleges is, objectively, an economically reasonable one. *Matsushita* dictates that if the alleged conspiracy is economically infeasible or irrational then, as a matter of law, summary judgment must be entered against the plaintiff. Second, the plaintiff in a distributor-termination case must also be able to point to evidence which tends to exclude the possibility that the manufacturer was operating independently in making his determination to terminate the distributor. Mere complaints from other competing distributors are not sufficient in this regard since they are equally consistent with both an independent and a collusive interpretation. The distributor must, instead, adduce positive evidence which tends to exclude the possibility of unilateral action.

818 F.2d at 1534 (footnote omitted).

We need not pause long at the first *Helicopter* requirement—the conspiracy DeLong alleges is eminently reasonable. BCS, Washington Mills, and DeLong (if it participated) all stood to gain economically by this arrangement. If DeLong's version of events is true, BCS in fact received its portion of the benefits of the scheme in the form of payments to its offshore affiliate, Wood & Thompson, which we discuss below. Termination of a distributor, DeLong, who refused to participate in the scheme is also economically reasonable. This case does not involve economically questionable behavior such as the predatory pricing scheme at issue in *Matsushita*. *See Winn v. Edna Hibel Corp.*, 858 F.2d 1517, 1520 (11th Cir. 1988).

In order to satisfy the second prong of the *Helicopter* inquiry, DeLong must show evidence of concerted action. This evidence "need not be such that *only* an inference

of conspiracy may be derived from it. It must, however, go beyond equivocal complaints and *tend* to exclude the inference of independent action." *Helicopter,* 818 F.2d at 1534 n. 4 (emphasis in original). We must determine whether a reasonable trier of fact might conclude from the evidence presently before us that Washington Mills and BCS engaged in an illegal conspiracy in restraint of trade. *See Helicopter,* 818 F.2d at 1535 n. 5. We believe that DeLong has satisfied its burden. We now turn to specific evidence adduced by DeLong that tends to show (1) that Washington Mills and BCS conspired to add a premium to the price of "special" media going to Pratt, although that media was identical to stock media; and (2) that DeLong's distribution arrangement with Washington Mills was terminated in furtherance of that conspiracy.

1. BCS/Washington Mills Conspiracy

(a) Evidence that "Special" Media was Identical to "Stock" Media

DeLong's allegations of a vertical price conspiracy center on the sale of media to Pratt. DeLong argues that BCS and Washington Mills conspired and combined to inflate the price of Washington Mills's standard media by labeling it "special" and charging Pratt a significantly higher price than Washington Mills' list price for identical media. The Washington Mills media sold to Pratt was designated as "special," and was assigned numbers indicating its intended use. DeLong adduced evidence that this "special" media was actually "generic" media; i.e., media that Washington Mills regularly produced and carried in stock, and that special media did not differ in size, shape, or composition from the media regularly stocked by Washington Mills. The increased price charged by Washington Mills for this product, DeLong asserted, was not justified by any cost differential.

The defendants now admit that the "special" media is not inherently different from Washington Mills's stock media. The media manufactured by Washington Mills for Pratt was "special" media known as P & W 5000, P & W 6000, and P & W 7000.[14] The defendants claim that these products were not listed on the price list nor carried in Washington Mills's regular inventory and that Washington Mills exercised a higher degree of quality and inventory control over the media sold to Pratt. However, two of these products, P & W 6000 and P & W 7000, are identified as stock media on Washington Mills's June 1983 and April 1982 price lists.

The stock items were sold to distributors at sixty-six cents per pound, less the twenty-five percent discount. Except for a few instances, the details of which are in dispute, Washington Mills quoted DeLong a wholesale price of eighty-five cents per pound for each of the Pratt items.[15] P & W 5000 is not listed on a stock Washington Mills price list, but Washington Mills records suggest that this item was carried in inventory at all times and sold to customers other than Pratt. Moreover, Washington Mills has sold all three types of "Pratt" media to other customers, and a BCS employee has stated that the only difference between such media sold to Pratt and to other customers is the labeling, i.e., the PMC number stamped on the Pratt boxes. (Robert Biebel Dep. 121-28). De-

[14] P & W 5000, PMC 3175-1, is a $\frac{7}{8} \times \frac{7}{8}$ tetrahedron pyramid, 20 bond. P & W 6000, PMC 3179-1, is a $\frac{5}{8} \times \frac{5}{8}$ angle-cut triangle, 25 degrees, 20 bond. P & W 7000, PMC 3178-1, is a $\frac{5}{8} \times \frac{1}{4}$ angle-cut triangle, 25 degrees, 20 bond.

[15] The eighty-five cent price was the price quoted to the distributor, which then would mark up that price for resale to Pratt. DeLong's initial successful bid to Pratt was $1.11 per pound for PMC 3175-1 and 3179-1 and $1.13 for PMC 3178-1. The exact prices paid for "special" media during the course of DeLong's relationship with Washington Mills are a subject of dispute between the parties, but it is clear that at all times the media sold to Pratt was priced substantially higher than Washington Mills's standard media.

Long also points to at least two instances where Washington Mills shipped media directly to Pratt in boxes which only carried the PMC number required by Pratt, and did not identify the manufacturer of the media as Washington Mills.

DeLong has made a strong showing that the so-called "special" media (sold at a high price of eighty-five cents per pound) was identical to media carried in Washington Mills's regular inventory and sold to other customers at lower prices. There is at least a genuine issue of fact as to whether the "special" media is identical to the lower priced stock media.

(b) Atlanta Meetings and Other Evidence of Agreement to Fix Price

In early October 1984, Hans van der Sande and Robert Baldauf of Washington Mills met with Robert Biebel of BCS in Atlanta to discuss "the PW situation in Columbus," and visited Pratt's Columbus plant. (Pl.Ex. 200). At this point, BCS was no longer selling media to the Columbus plant. During that meeting, however, the fact that BCS was willing to turn the Pratt Columbus account over to Washington Mills for direct sales was discussed. Van der Sande's report of that meeting stated that Biebel said he has "several good friends at P & W," who "take trips on his boat to the Bahamas and give him an edge over competition." (Pl.Ex. 191). The record indicates that BCS did provide Caribbean trips on its corporate boat for certain Pratt employees, including James Neil, Moe Dahill, and Dave Dawson, all of whom were responsible, to varying degrees, for testing and approving media.[16]

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[16] DeLong contends that Washington Mills gave BCS employees, particularly Robert Biebel and William Biebel, free Caribbean vacations. There does not appear to be evidence in the record suggesting that Washington Mills gave trips to BCS people.

There was also evidence that BCS worked with its contacts at Pratt to develop the Washington Mills media used at the Columbus plant. Although the extent of their collaboration remains disputed, it was undisputed that Washington Mills and BCS coordinated their activities in developing the media for Pratt.[17]

Regarding the October 1984 trip to the Columbus plant, van der Sande's report stated that "[w]e had a great visit, inside sources confirmed to Bob [Biebel] that the Pratt people were impressed by our visit. We were given (special permission) to visit the actual manufacturing facilities." (Pl.Ex. 192, van der Sande Dep. 39). The report also stated: "his [Biebel's] friend Jim at the Columbus plant makes sure which media does or does not work." (Pl.Ex. 191).

The foregoing evidence supports DeLong's allegations of joint action between Washington Mills and BCS in regard to media sales to Pratt. The evidence suggests that BCS had contacts at Pratt which could provide an incentive for Washington Mills to coordinate with BCS in its dealings on the Pratt account, and that the two companies did in fact act jointly with respect to the Pratt account.

On the day following the October 1984 trip to the Columbus plant with BCS officials, van der Sande made a routine sales call on DeLong, who was actually servicing

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[17] DeLong alleges that Lawrence W. Bates, a former Pratt employee, was a key player in the arrangement between BCS and Pratt. Bates worked for Pratt for 37 years, retiring in 1977. Bates then went to work for BCS as a salesman responsible almost exclusively for the Pratt account in Connecticut. Contrary to DeLong's assertions, Bates retired several years before the Washington Mills media was approved by the Columbus plant, and thus he could not have personally issued the PMCs in question. Undoubtedly, his contacts at Pratt were advantageous to BCS, but our review of the record indicates that his role was not as instrumental as DeLong suggests. Bates testified that he did not deal with the Columbus plant at all.

the Pratt account at the time. Van der Sande did not mention his visit the day before to the Columbus plant. In van der Sande's report of that meeting dated October 10, 1984, he stated that DeLong was "not very happy with BCS, and P & W . . . . Harold does not play with a full deck either. . . . He is not all wrong about the B.C.S. situation, long term it may not work. Bob Bieble [sic] feels we are secure for at least 3 years unless Delong [sic] does not play the game." (Pl.Ex. 194).

The evidence that Washington Mills and BCS had worked together in developing the Pratt media; that the Pratt media was priced at a premium though it was in fact identical to generic media; that BCS's contacts at Pratt provided an incentive for joint action; that Washington Mills and BCS were continuing to work together on the Pratt account during the October, 1984 plant visit, long after DeLong had replaced BCS as the Pratt distributor; and that Washington Mills and BCS were conversing in October, 1984 about the good prospects for continuing the Pratt arrangement unless DeLong refused to "play the game"—all support DeLong's assertion that Washington Mills and BCS had agreed to "pad" the price of the Pratt media.

(c) "Commissions" from Washington Mills to a BCS Affiliate

DeLong presents additional, and more compelling, evidence of joint action between Washington Mills and BCS. Washington Mills paid Wood & Thompson, a Bahamian corporation which owned most of BCS's stock at the time, funds which were tied to sales of media to Pratt.[18]

[18] Prior to 1982, William and Robert Biebel owned all of BCS's stock. In 1982, they sold their interest in BCS to Malin, Kilrea & Larne, a Hong Kong corporation. Malin, Kilrea and Wood & Thompson are related corporations. During the time Malin, Kilrea owned BCS, BCS regularly paid "management fees" to Malin, Kilrea, which evidently were used to fund personal annuities for William Biebel and Robert Biebel. The payments from Washington Mills

The payment of these funds, which amounted to approximately $50,000, is not in dispute. The payments were based on 15% of the wholesale selling price of media to Pratt and lasted for approximately two years after BCS ceased servicing the Columbus plant.

The defendants claim that this money was compensation for technical work done by BCS and for BCS's work in getting Washington Mills's product approved by Pratt, even though BCS no longer sold media to the Columbus plant. Such an "override" was not customary; in fact the evidence shows that Washington Mills had never paid such a commission to any other distributor. Defendants claim that the Pratt situation was so complex that additional compensation to BCS was justified.

DeLong claims that these "commissions" actually represented BCS's share of the inflated price Pratt paid for media. To support its argument, DeLong points to testimony by James Neil, a supervisor in the engineering group at Pratt who was instrumental in issuing the PMCs for the media at issue in this case. Neil worked closely with BCS from 1981 through 1983 and considered Robert Biebel to be a friend of his. Neil testified that he worked with Robert Biebel on testing of media, and that Biebel was compensated for this testing at the time it was performed. Biebel and BCS were compensated for testing directly, not through later sales of media to Pratt. Robert Biebel testified, however, that BCS was not paid for its 1979-83 testing and development of media for Pratt.

This testimony, along with other evidence in the record, demonstrates that genuine issues of material fact exist as to the precise nature of the payments from Washington Mills to BCS. Defendants call it compensation for their work on "developing" the Pratt account, while DeLong claims that it is merely Washington Mills passing on to BCS the benefits of the inflated price, because BCS was

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directly to Wood & Thompson served as these fees. BCS also made a $50,000 "loan" to Wood & Thompson which was never repaid.

integral in setting up the scheme. A jury reasonably could infer that Washington Mills desired to enter into an agreement with BCS to exploit BCS's contacts with key Pratt people, and agreed to pay the commissions to BCS's offshore sister corporation, Wood & Thompson. A jury also could conclude that the Wood & Thompson "commissions" demonstrate that Washington Mills and BCS agreed on the "pad" to the price. The amount of the commissions was linked to the sale price of media to Pratt, and there is a reasonable inference that the "commissions" were a means for BCS to share in the "pad" by which the price was inflated.

Viewing the totality of this evidence in the light most favorable to DeLong which we must, *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L.Ed.2d 176 (1962), a jury reasonably could conclude that Washington Mills and BCS worked together to develop "special" media for sale to Pratt and agreed to sell it at an inflated price. The meeting between BCS and Washington Mills officials in Atlanta, the trip to Pratt's Columbus plant, gratuities from BCS to key Pratt people, and the "commissions" paid by Washington Mills based on a percentage of the price of media sold to Pratt—all reasonably tend to support DeLong's conspiracy allegation.

2. DeLong's Termination in Furtherance of the Conspiracy [19]

(a) DeLong Confronts Washington Mills

Before DeLong began supplying media to Pratt, the relationship between DeLong and Washington Mills appears

[19] In addition to the evidence discussed in the text, DeLong contends that complaints by dealers other than BCS about DeLong's pricing practices led to its termination. After it began selling Washington Mills products in 1982, DeLong was an aggressive seller and converted many end-users to Washington Mills media. DeLong's aggresive sales practices also engendered complaints from competing Washington Mills distributors. Corrosion Specialties,

to have been good. From the earliest sales of Washington Mills's "special" media to Pratt, however, DeLong was concerned. A DeLong employee stated that no Washington Mills ceramic media had ever been so expensive, and Harold DeLong feared that competing distributors were being quoted a lower price. On multiple occasions throughout 1983, 1984, and 1985, Harold DeLong and his employees directly confronted Washington Mills with their belief that the "special" media was identical to stock media. DeLong was told that the Pratt media was "special" and that it could not purchase the media at the stock price listed on Washington Mills's general price list, but DeLong did not believe the Washington Mills personnel.

DeLong pressured Washington Mills to sell it generic media to resell to Pratt. DeLong sought to have Washington Mills apply the PMC number to boxes of stock media and ship it to Pratt at the stock price, but Washington Mills refused to do so. Robert Baldauf, a Washington Mills employee, visited DeLong's Atlanta offices in May 1985 to discuss the Pratt & Whitney pricing situation. This was just a few months before DeLong was terminated. When Harold DeLong and Dan Dickey, the DeLong salesman primarily responsible for the Pratt account, confronted Baldauf with their assertions that the

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Inc., Paschal Associates, Inc., and BRW Quality Metal Finishing, Inc. all complained to Washington Mills that DeLong was underbidding them, and BRW suggested that DeLong's distributorship be terminated. Washington Mills did not act immediately on this request, but rather issued an "open letter" to certain distributors detailing problems with inter-distributor selling.

This evidence is not sufficient to show concerted action between Washington Mills and its other distributors to terminate DeLong. The Supreme Court has held that in a distributor termination case, "something more than evidence of complaints [by other distributors] is needed" for a plaintiff to survive a motion for summary judgment. *Monsanto*, 465 U.S. at 764, 104 S.Ct. at 1471. We address that "something more" in the text.

so-called "special" media was in fact Washington Mills's standard 20-bond composition, Baldauf replied that Hans van der Sande handled that situation and that, in any event, the media sold to Pratt contained diamond dust. DeLong suspected that the "special" media was stock media and did not contain diamond dust, but he could not absolutely confirm his suspicions. Baldauf denied telling any DeLong employee that the Pratt media contained diamond dust.

The record is clear that DeLong drew constant attention to what it considered a discrepancy in the price of media sold to Pratt, and that Washington Mills repeatedly insisted that the higher price for the Pratt media was justified. This evidence supports DeLong's assertion that it was an obstacle to the continuation of the scheme to "pad" the Pratt price, and that it was terminated to remove that obstacle.

(b) Atlanta Meetings

Harold DeLong called BCS sometime in 1983, before DeLong received its first Pratt order, and asked William Biebel for information regarding the BCS numbers on the Pratt PMCs. DeLong needed this information because the media was listed on Pratt's PMC as being manufactured by BCS, when in reality it was Washington Mills's media. When DeLong asked Biebel about these numbers, Biebel suggested that the two companies "work out an agreement between ourselves," because of BCS's development work and DeLong's proximity to the Columbus plant. (William Biebel 2d Dep. 113).

Sometime shortly after this discussion, in August 1983, Robert Biebel of BCS flew to Atlanta to meet with Harold DeLong to discuss a "mutual working arrangement" regarding Pratt, where, according to Biebel, BCS would provide technical support to Pratt and DeLong would warehouse the media. (Robert Biebel Dep. 23,

William Biebel Dep. 84, 86).[20] At this meeting, Biebel told DeLong something to the effect that there was "plenty of money" in the Pratt account for both BCS and DeLong. (Robert Biebel Dep. 31, van der Sande Dep. 52). DeLong was not at all interested in working with BCS; Harold DeLong believed he had the necessary expertise and facilities to serve Pratt himself.

In addition to the above indications from BCS, there is also evidence that Washington Mills told DeLong that the Pratt account "belonged" to BCS. (Dickey Dep. 173).

In October 1984, one day after he visited the Pratt plant with BCS principals, van der Sande met with Harold DeLong on a sales call. It was after that meeting that van der Sande stated that DeLong was "not very happy with BCS, and P & W . . . . Harold does not play with a full deck either . . . . He is not all wrong about the B.C.S. situation, long term it may not work. Bob Bieble [sic] feels we are secure for at least 3 years unless Delong [sic] does not play the game." (Pl.Ex. 194).

This statement by a BCS principal to a Washington Mills employee that BCS is concerned that DeLong might not "play the game" is evidence from which a jury reasonably could find joint action between Washington Mills and BCS regarding the termination of DeLong. Biebel's attempt to enter into an arrangement with DeLong whereby ~~everyone could~~ earn "plenty of money" lends further support to BCS's involvement in DeLong's termination when DeLong refused to participate in the scheme.

(c) Termination of DeLong

Genuine issues of material fact also exist with regard to the reasons for DeLong's termination. DeLong, of course, asserts that it was terminated by Washington

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[20] DeLong claims, but has adduced no evidence to support its claim, that this meeting was arranged by Peter Ford of Washington Mills. Defendants deny this.

Mills for its refusal to cooperate in the alleged illegal price fixing scheme and for being a price cutter. Washington Mills alleges that it terminated DeLong because it was behind in its payments and abusive to Washington Mills personnel.

Although DeLong does not make this argument explicitly, the thrust of its position is that the reasons Washington Mills gave for its termination of DeLong are a pretext for the actual reasons DeLong was terminated; i.e., DeLong's refusal to participate in the Pratt scheme. While such evidence standing alone would not be sufficient to show joint action in violation of the antitrust laws, "[e]vidence of pretext, if believed by a jury, would disprove the likelihood of independent action on the part of" Washington Mills. *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 474 (3d Cir.1985). *See O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1469 (9th Cir.1986) (antitrust plaintiff must come forward with specific factual support to overcome defendant's asserted independent business justification). *Cf. H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir.1981) (mere fact that a business reason advanced by a defendant for its cutoff of a customer is undermined does not, by itself, justify the inference that the conduct was therefore the result of a conspiracy), *cert. denied*, 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 144 (1982); *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 860 (5th Cir. Unit B) (poor credit may constitute a defendant's proof that a refusal to deal was a unilateral rather than conspiratorial action), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981).[21]

A jury is entitled to determine whether Washington Mills's explanation of DeLong's termination is credible, because the facts surrounding the allegedly "abusive" be-

[21] This former Fifth Circuit case was decided after the close of business on September 30, 1981, and is binding precedent under *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1982).

havior of DeLong employees is disputed. Dan Dickey, a DeLong salesman who allegedly was abusive toward Washington Mills personnel, testified that he was not abusive, and Harold DeLong stated that he was "shocked" to hear of allegations of abusive behavior by his employees to Washington Mills personnel. (DeLong Dep. 78-91). Washington Mills personnel, on the other hand, testified that Dan Dickey, Betty Day, DeLong's purchasing agent, and other DeLong employees were abusive to Washington Mills personnel, calling them names and using excessive profanity. Van der Sande testified that the Pratt situation "could have contributed" to DeLong's termination, but that he did not think that was the reason. (van der Sande Dep. 94). John Williams testified that he did not consider the Pratt situation when he decided to terminate DeLong, but he did have the complaints of competing distributors in mind when he terminated DeLong.

Washington Mills's other stated reason for terminating DeLong, delinquent payments, is also in dispute. Robert Baldauf testified that he recommended DeLong be terminated for abusive behavior, but that he did not check DeLong's payment history, nor did Hans van der Sande. DeLong admits that its payment times increased as its pricing disputes with Washington Mills increased, and that DeLong was "trying to get their attention a little bit." (DeLong Dep. 90). DeLong's payment history, however, was no worse than several other Washington Mills distributors.

Termination of distributors by Washington Mills was extremely rare. Hans van der Sande testified that in his thirteen years at Washington Mills, to his knowledge only two other distributors had been terminated, one which did not buy from Washington Mills for over a year and another which did not pay its bills for eight months.

We believe that DeLong has adduced evidence which tends to exclude the possibility that Washington Mills was acting independently when it terminated DeLong. There are genuine issues of fact regarding the reasons for the termination. A reasonable jury could find that Washington Mills and BCS worked together to develop the "special" media for Pratt utilizing the contacts which BCS had cultivated at Pratt; that Washington Mills and Pratt agreed to add an artificial "pad" to the price; that both Washington Mills and BCS believed that the Pratt account belonged to BCS; that both Washington Mills and BCS attempted to get DeLong to go along with the scheme to inflate the price and share the profit, but that DeLong refused to "play the game," that DeLong was a constant irritant and posed a risk to the scheme to "pad" the price; and finally, a reasonable jury could find that there was joint action between Washington Mills and BCS in the decision to terminate DeLong in order to remove the risk which it posed to the scheme.

3. Defendants' Arguments

Defendants argue that Washington Mills unilaterally established its own wholesale prices and never agreed with any distributors as to the retail price to be charged by the distributor. While there is ample evidence to this effect in favor of Washington Mills, we cannot ignore the strong circumstantial evidence summarized above that Washington Mills and BCS did conspire to inflate the price of media destined for Pratt, thus agreeing that a fixed "pad" would be added to the wholesale price charged by Washington Mills and the retail price charged by BCS. Thus, there are genuine issues of fact.

Defendants also assert that the fact that Washington Mills's personnel testified that no one discussed the termination of DeLong with anyone at BCS until after DeLong was terminated is evidence of no joint action. This argument is unpersuasive for the same reason we just stated in rejecting defendants' argument that there was no evi-

dence of any agreement with any other distributor regarding the price of Washington Mills products. Conspiracies are rarely evidenced by explicit agreements, and must almost always be proven by inferences that may be fairly drawn from the behavior of the alleged conspirators. *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir.1981) (citation omitted), *cert. denied*, 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 144 (1982). Circumstantial evidence can establish the existence of a conspiracy in antitrust litigation. *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 558 (5th Cir.1980), *cert. denied*, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981). At a minimum, though, "the circumstances [must be] such as to warrant a jury in finding that the conspirators had a unity of purpose of a common design and understanding, or a meeting of minds in an unlawful agreement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946).

This court must look beyond the defendants' bald denial of concerted action and analyze the substance of DeLong's evidence in order to determine whether summary judgment was appropriate. "When faced with defendants' sworn denial of the existence of a conspiracy, it is incumbent upon the plaintiff to produce significant probative evidence demonstrating that a genuine issue of fact exists as to this element of the complaint." *Pan-Islamic*, 632 F.2d at 554.

C. *Conclusion*

The record contains evidence from which a reasonable jury could conclude that Washington Mills and BCS conspired to fix an inflated price for media sold to Pratt, that DeLong was not "playing the game," that therefore DeLong posed a threat to uncover the scheme, and that DeLong was terminated because of its refusal to play the game. This evidence constitutes "positive evidence which

tends to exclude the possibility of unilateral action." *Helicopter*, 818 F.2d at 1534.

The record in this case is filled with disputed issues of material fact regarding a vertical price conspiracy between Washington Mills and BCS and DeLong's alleged termination pursuant to that conspiracy. Therefore, summary judgment on DeLong's section 1 claim was improper.

III. ROBINSON-PATMAN ACT CLAIMS

DeLong's complaint alleged that Washington Mills engaged in unlawful price discrimination in violation of section 2 of the Clayton Act, as amended by section 1 of the Robinson-Patman Act.[22] DeLong contends that Wash-

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[22] Section 2 of the Clayton Act, as amended by section 1 of the Robinson-Patman Act, provides in relevant part that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . .

15 U.S.C. § 13(a). As this court recently has reiterated, "the basic purpose of Section 2(a) of the Robinson-Patman Act is to insure that purchasers from a single seller would not be injured by the seller's discriminatory pricing policies. The complaining party must allege and prove that there were two sales made by the same seller to at least two different purchasers at different prices."

ington Mills discriminated in price by selling media of like grade or quality to others at prices lower than those offered to DeLong.[23]

The district court denied the defendants' motion for summary judgment in part and granted it in part. The court concluded that the alleged more favorable payment periods and greater discounts given to BCS by Washington Mills and the "commissions" paid by Washington Mills to BCS's offshore affiliate, Wood & Thompson, could constitute price discrimination, and thus denied summary judgment on those aspects of DeLong's Robinson-Patman claims. District Court Order 21, 24. Neither party contests that ruling on appeal. The court granted defendants' motion for summary judgment on DeLong's claim that the different prices for "stock" and "special" media constituted price discrimination under the Robinson-Patman Act. DeLong appeals this aspect of the district court's decision.[24]

Pierce v. Commercial Warehouse, Div. of Thompson Automotive Warehouse, 876 F.2d 86, 87 (11th Cir.1989). A Robinson-Patman plaintiff must also demonstrate some sort of competitive injury. *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 581-82 (5th Cir.1982); *M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1065-66 (5th Cir.1975).

[23] In the district court, DeLong also argued that Washington Mills's infrequent sales to Pratt during the times material to this action were at lower prices than those charged to DeLong for media which DeLong resold to Pratt, an allegation of "primary line" price discrimination under the Robinson-Patman Act. The district court held that DeLong had not presented sufficient evidence of market conditions showing competitive injury, nor did DeLong show the requisite predatory intent on the part of Washington Mills. Therefore, it granted summary judgment against DeLong on those aspects of its Robinson-Patman Act claim based on Washington Mills direct sales to end-users. District Court Order 19-20, 24. DeLong does not contest this district court ruling on appeal, so we do not address those aspects of DeLong's Robinson-Patman claim. The Robinson-Patman Act claim DeLong raises before us is addressed in the text.

[24] Defendants' brief also argues that DeLong has not demonstrated sufficient competitive injury under the Robinson-Patman

The district court partially granted defendants' motion for summary judgment based on the judicially created "availability defense" as stated in *Shreve Equipment, Inc. v. Clay Equipment Corp.*, 650 F.2d 101, 105 (6th Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 397, 70 L.Ed.2d 213 (1981).[25] *See Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1038 (9th Cir.1987), *cert. granted*, —— U.S. ——, 109 S.Ct. 3154, 104 L.Ed.2d 1018 (1989); *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1130 (D.C.Cir. 1988); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1025-26 (2d Cir.1976), *cert. denied*, 429 U.S. 1097, 97 S.Ct. 1116, 51 L.Ed.2d 545 (1977).

The availability defense is stated when, although the seller offered different prices for the same commodity to different buyers, the lower price was available to all buyers. "Where a purchaser does not take advantage of a lower price or discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or the discrimination is not the proximate cause of the injury." *Shreve*, 650 F.2d at 105. The district court held that the price difference between special and stock media were subject to the availability defense even though Pratt would only buy "special" media marked with its PMC numbers. The court emphasized that the fact that Pratt would not accept anything but special media did not affect the availability of stock media to DeLong from Washington Mills. We believe that the district court misapplied the availability defense to the unique facts of this case.

Act with regard to the "special" versus stock aspect of its claims as well as on other aspects of its claims upon which the district court denied summary judgment. The district court did not reach the competitive injury question. Therefore, defendants' arguments on this point, and plaintiff's in reply, are more properly addressed to the district court in the first instance.

[25] For purposes of this appeal, we assume but expressly do not decide whether this circuit recognizes the availability defense.

We find *Shreve* to be distinguishable. In that case, the principal owner of Shreve was both a dealer and a territorial manager for a farm equipment manufacturer. Because he was a territorial manager, the manufacturer did not pay him the volume-based discount on sales of farm equipment that other dealers received. The court rejected Shreve's Robinson-Patman Act claim on the ground that had its owner not chosen to be a territorial manager and obtained the benefits of that position, Shreve would have received the volume discounts.

The requirement of *Shreve* that the lower price be "functionally available" negates the availability defense in this case. In this case, unlike *Shreve*, DeLong did not voluntarily forego its ability to purchase special media at the stock price; Washington Mills would not sell the media to DeLong at that price for resale to Pratt. DeLong contends that it did not have functional access to the stock price for media, because Washington Mills continually represented that the media going to Pratt was "special" and was not available for sale to Pratt via DeLong at the stock price. Because Washington Mills did not offer stock prices on the media labeled "special," the stock price was not functionally available within the meaning of *Shreve*.

The defendants contend that regardless of the difference in price between stock and special media, the stock media was available for purchase by DeLong at all times. Defendants insist that DeLong could have obtained media at stock prices for resale to Pratt if DeLong itself had only agreed to put Pratt's PMC numbers on the boxes of media. This is flatly inconsistent with defendants' assertions throughout its dealings with DeLong that special media was somehow different from stock media, and that the difference justified the higher price for media sold to Pratt. Stock media was available for purchase by DeLong, but such media could not be resold to Pratt.

Ultimately, resolution of this issue depends on whether special media and stock media are the same, i.e., are goods

"of like grade and quality" within the meaning of the Robinson-Patman Act. If products are physically identical, despite differences in labeling or branding, then they are "of like grade and quality" for the purpose of stating a prima facie Robinson-Patman Act case, even though consumers may prefer a higher priced "premium" product. *FTC v. Borden Co.*, 383 U.S. 637, 643-44, 86 S.Ct. 1092, 1097, 16 L.Ed.2d 153 (1966); *see First Comics Inc. v. World Color Press*, 672 F.Supp. 1068, 1071 (N.D. Ill.1987). As we discussed in Part II *supra*, DeLong has presented substantial evidence tending to show that "special" media is identical to Washington Mills's stock product. If the products are in fact identical, and Washington Mills charged different prices to DeLong and others for them, then summary judgment on this aspect of DeLong's Robinson-Patman Act claim was improper. We therefore reverse the district court on this issue.

IV. PENDENT STATE LAW CLAIMS

DeLong appended Georgia law breach of contract, tortious interference with business relations, and fraud claims to its complaint that the defendants violated the federal antitrust laws. The district court granted summary judgment in favor of defendants on all state law claims. We agree with the district court that summary judgment was appropriate as to the contract and tortious interference claims, but reverse as to one aspect of the fraud claim.

A. *Breach of Contract*

DeLong contends that the district court erred in granting summary judgment for defendants on its breach of contract claim. The district court rejected DeLong's claim under Georgia law for breach of an oral distributorship contract with Washington Mills, stating that "distributorship agreements which are not in writing are terminable at will for any cause." We, like the district court, find *West Virginia Glass Specialty Co. v. Guice & Walshe, Inc.*, 170 Ga.App. 556, 317 S.E.2d 592, 594 (1984), to

be on point. In *West Virginia Glass,* the court held that where there was no written agreement between a distributor and a manufacturer and no definite time period for the distributorship, the arrangement was terminable at will by either party without contractual liability.

DeLong correctly observes that oral contracts can be enforceable. In order for any contract to be enforced, however, it must contain definite terms. *Vitner v. Funk,* 182 Ga.App. 39, 354 S.E.2d 666 (1987); *Parks v. Atlanta News Agency, Inc.,* 115 Ga.App. 842, 156 S.E.2d 137 (1967). DeLong can point to no definite duration of the distributorship nor to any exclusive rights conferred under it, so we must reject its argument. We find no error in the district court's holding that no definite contract existed between DeLong and Washington Mills.

DeLong also argues promissory estoppel based on O.C.G.A. § 13-3-44(a), which provides that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." DeLong's promissory estoppel argument fails for the same reason as its contract claim—it can point to no definite promise by Washington Mills regarding the terms and duration of its distributorship. *Loy's Office Supplies, Inc. v. Steelcase, Inc.,* 174 Ga.App. 701, 331 S.E.2d 75, 76 (1985), squarely rejects the same argument in a similar distributor termination situation. We find *Loy's* controlling on this issue. Summary judgment on DeLong's contract claims was properly granted.

B. *Tortious Interference with Business Relations*

DeLong challenges the district court's grant of summary judgment on its tortious interference claim. A claim based on tortious interference with business relations does not require evidence of a binding contract. *Integrated*

Micro Systems, Inc. v. NEC Home Electronics (USA), Inc., 174 Ga.App. 197, 329 S.E.2d 554, 557-58 (1985). Interference with the plaintiff's relationships with its customers, suppliers, or representatives may be actionable even though such relationships may be terminable at will. *U.S. Anchor Manufacturing, Inc. v. Rule Industries, Inc.*, 717 F.Supp. 1565, 1577 (N.D.Ga.1989), *citing E.D. Lacey Mills, Inc. v. Keith*, 183 Ga.App. 357, 359 S.E.2d 148, 155 (1987).

The party charged with tortious interference must have "(1) acted improperly and without privilege, (2) purposely and with malice with the intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) for which the plaintiff suffered some financial injury." *Id.*, *quoting Hayes v. Irwin*, 541 F.Supp. 397, 429 (N.D.Ga. 1982), *aff'd mem.*, 729 F.2d 1466 (11th Cir.), *cert. denied*, 469 U.S. 857, 105 S.Ct. 185, 83 L.Ed.2d 119 (1984). Interference with business relationships will be excused if it is privileged. *Orkin Exterminating Co. v. Martin Co.*, 240 Ga. 662, 242 S.E.2d 135 (1978). "[I]n order for [the defendant] to come under the protection of the competition privilege, it must establish inter alia that it did not employ improper means." *Integrated Micro Systems*, 174 Ga.App. at 202, 329 S.E.2d at 559. The privilege defense is not available where interference is achieved through actions taken in violation of a confidential relationship. *Hayes*, 541 F.Supp. at 430; *E.D. Lacey Mills*, 183 Ga.App. at 364, 359 S.E.2d at 156.

It is undisputed that after Washington Mills terminated DeLong's distributorship, Washington Mills provided other distributors with DeLong's customer list and encouraged those distributors to solicit those customers' business.[26]

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[26] DeLong's tortious interference claim has another aspect, namely that the very act of termination by Washington Mills constituted tortious interference because DeLong could no longer provide its

DeLong alleges that it turned over its customer list to Washington Mills in confidence, for the sole purpose of facilitating "drop shipment" of media directly to end-users. Washington Mills argues that it received the names of DeLong's customers in the ordinary course of business and that there is no evidence of any agreement that the list would be kept confidential after termination, and that its conduct following DeLong's termination therefore was privileged. We agree. Customer lists are "not within the purview of traditional Georgia law as to property and [are] not protectable from post-employment disclosure and use in the absence of contract." *Durham v. Stand-By Labor of Georgia*, 230 Ga. 558, 198 S.E.2d 145, 149 (1973). *See Textile Rubber & Chemical Co. v. Shook*, 243 Ga. 587, 255 S.E.2d 705, 709 (1979). The record indicates no evidence of any agreement that DeLong's customer list would be kept confidential upon termination.

DeLong's reliance on *Robert B. Vance & Associates, Inc. v. Baronet Corp.*, 487 F.Supp. 790 (N.D.Ga.1979), is misplaced. In *Vance*, the customer lists at issue were treated as trade secrets, which was not the case here. 487 F.Supp. at 799. Furthermore, the competition between sellers in *Vance* occurred prior to the termination of the distributorship agreement, as opposed to this case, where the competition occurred after the distributorship was legally terminated. DeLong has presented no evidence to suggest that these contacts occurred before it was terminated nor that its business was disparaged.

The district court pointed out that the end-users of media are appropriately characterized as Washington Mills's customers as well as DeLong's customers, since the end-users are employing Washington Mills products.

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customers with Washington Mills media. Because Washington Mills was free to terminate DeLong, *see supra*, any negative effect on DeLong's business resulting from that termination cannot constitute tortious interference. *West Virginia Glass*, 317 S.E.2d at 594.

Washington Mills therefore has a right to solicit those customers. It is not a tort to solicit the trade of another's customers. *Parks v. Atlanta News Agency, Inc.*, 115 Ga.App. 842, 156 S.E.2d 137, 140 (1967).

We therefore reject DeLong's tortious interference claim and affirm the district court on this issue.

C. *Fraud*

DeLong alleged several instances of fraud. There are five elements to a claim of fraud under Georgia law: (1) a false representation of a past or present fact; (2) scienter; (3) intention to induce the plaintiff to commit an act or refrain from committing an act; (4) reliance; and (5) damage. O.C.G.A. § 51-6-1; *Parsells v. Orkin Exterminating Co.*, 172 Ga.App. 74, 322 S.E.2d 91 (1984). The district court granted summary judgment in favor of defendants. We believe that the district court improperly granted summary judgment on one aspect of DeLong's fraud claim.

DeLong alleged that Washington Mills's deceptive labeling of special media constituted fraud. The court found no justifiable reliance, because DeLong was aware of the falsity of the representation, citing *Blanchard v. West*, 115 Ga.App. 814, 156 S.E.2d 164, 166 (1967); *Gaultney v. Windham*, 99 Ga.App. 800, 109 S.E.2d 914 (1959). Those cases stand for the proposition that a fraud plaintiff must have used due diligence in attempting to establish the truth or falsity of a defendant's assertions. Where the plaintiff repeatedly confronts the defendant with the apparent falsity of its representations, and the defendant repeatedly confirms its original statement, asserting special knowledge, reliance is justified. *Georgia-Carolina Brick & Tile Co. v. Brown*, 153 Ga. App. 747, 266 S.E.2d 531, 539 (1980).

The due diligence requirement "does not go so far as to require the exhaustion of all available means to ascertain the truth of the representations," but demands only

reasonable care, which is a jury question. *Gibson v. Home Folks Mobile Home Plaza, Inc.*, 533 F.Supp. 1211, 1216 (S.D.Ga.1982). As discussed above, we believe that DeLong has demonstrated a genuine issue of fact as to whether special media was in fact identical to stock media. Washington Mills's repeated assertions to the contrary raise a jury question as to fraud. We therefore reverse the district court's grant of summary judgment on this aspect of DeLong's fraud claims.

De Long raised other fraud claims, which the district court rejected because the alleged frauds referred only to future events and therefore are not actionable. *Lanham v. Mr. B's Oil Co.*, 166 Ga.App. 372, 304 S.E.2d 738, 739 (1983). DeLong argues that Washington Mills's conduct falls within the exception for promises regarding future events made with the present intention not to perform, but points to no specific evidence to support this claim of Washington Mills's present intention. DeLong's arguments on appeal concerning these other fraud claims thus are without merit, and the district court appropriately granted summary judgment on those claims.

V. CONCLUSION

In summary, we hold that summary judgment was improperly granted on DeLong's allegation of a vertical price conspiracy by the defendants in violation of section 1 of the Sherman Act. We further hold that summary judgment was improper on the Robinson-Patman Act claim raised by DeLong on appeal. With regard to the state law issues, we affirm the decision of the district court granting summary judgment on DeLong's contract and tortious interference with business relations claims, but reverse as to the fraud claim which centers on Washington Mills's representations concerning special and stock media.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8049

DELONG EQUIPMENT COMPANY,
Plaintiff-Appellant,
Cross-Appellee,

versus

WASHINGTON MILLS ELECTRO MINERALS CORP.,
f/k/a WASHINGTON MILLS ABRASIVE CO.,
WASHINGTON MILLS CERAMIC CORP.,
JOHN T. WILLIAMS and PETER WILLIAMS,
Defendants-Appellees,
Cross-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

[Filed Aug. 3, 1993]

Before: KRAVITCH, Circuit Judge, GODBOLD and OAKES*, Senior Circuit Judges

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* Honorable James L. Oakes, Senior U.S. Circuit Judge for the Second Circuit, sitting by designation.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

APPENDIX F

EXCERPT FROM JURY INSTRUCTIONS

* * * *

[2454] The plaintiff in this case seeks damages for injury to [2455] its business, claims have been suffered or sustained as a result of alleged violations by defendants of the antitrust laws of the United States.

The basic purpose of the antitrust laws is to promote competition, not to limit or control prices charged in the marketplace, nor is it the purpose of antitrust laws to restrict the right of a manufacturer such as Washington Mills to select with whom it will deal to set prices at which it will sell its products and to decide with whom it will not deal.

Now, in this case, if the defendants acted unilaterally in setting the price of the ceramic media to DeLong and acted unilaterally in terminating DeLong, it cannot be found to have violated the Sherman antitrust act.

Specifically, the plaintiff claims this: First, that the defendants, that is, Washington Mills, Williams and Williams, along with BCS and William and Robert Biebel and others combined and conspired to fix the price of preformed ceramic tumbling media which was sold to DeLong Equipment Company.

DeLong alleges that the conspiracy was carried out by the defendants by calling stock ceramic media special media, thereby justifying the maintaining of a high price being charged to Pratt & Whitney by BCS. DeLong says that when it refused to go along with the conspiracy, it was [2456] terminated by Washington Mills as a distributor.

Second, that the defendants engaged in unlawful price discrimination by selling media of like grade or quality to others at prices lower than as offered to DeLong. It is

asserted by DeLong that Washington Mills sold media to it and BCS for 85 cents per pound, but that BCS was given rebates which reduced the price to 49 and one-half cents per pound for BCS. Section 1, Title 15 of the United States Code, which deals with restraint of trade provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal." This is the law that is commonly called the Sherman antitrust act.

The purpose of the Sherman antitrust act is to preserve and encourage free and open business competition so that the public may receive better goods and services at a lower cost. Congress has determined that price restraints among competition is bad for commerce and, therefore, that arrangements among competitors which attempt to fix prices are illegal. It does not matter whether the prices agreed upon are reasonable or unreasonable, nor does it matter whether prices are actually affected by the agreement.

So, any unreasonable interference by contract or combination or conspiracy with the ordinary, usual, and freely competitive pricing of a distribution system of the open [2457] market in interstate trade and commerce constitutes an unreasonable restraint of interstate trade and is a violation of federal antitrust laws.

The phrase, "in restraint of interstate trade" means in restraint of trade and commerce which takes place between persons or business organizations in one state and those in another state; that is to say, trade and commerce which moves or flows or takes place not wholly within the boundaries of a single state but across state lines, that is, from one state into one or more other states.

To restrain interstate trade and commerce means to interfere unreasonably with the ordinary and freely competitive pricing or distribution system of the open market in interstate trade and commerce.

In order to prove its claims that the defendants engaged in illegal price fixing, the plaintiff must prove by a preponderance of the evidence each of the following elements: First, that the defendants entered into a conspiracy. Second, that the purpose or predictable effect of the conspiracy was to fix prices. Third, that the conspiracy unreasonably restrains or affects interstate commerce. And, fourth, that the plaintiff was injured in its business or property as a result of the defendants' actions.

As I told you, the first element that the plaintiff must prove is that the defendants entered into a conspiracy. [2458] Now, this is important because the part of the Sherman Act that we are concerend with here outlaws certain joint activities by competitors but not actions taken by a single firm or corporation.

Indeed, the word, "conspiracy," which is used in the Sherman Act, means together with someone else. A conspiracy is formed when two or more persons or corporations join together to accomplish some unlawful purpose by acting together. The essence of a conspiracy is an agreement between two or more persons or corporations to violate or disregard the law.

Thus, in order to meet its burden of proof on the first element, the plaintiff must prove that the defendants, with others, came to a mutual and common understanding to accomplish or attempt to accomplish an unlawful purpose, that is, to fix or attempt to fix prices.

The first thing that is required for a conspiracy is at least two separate parties. This means that in order to find a conspiracy in this case, you must find that Washington Mills, acting through its officers or employees, conspired with BCS through its officers and employees, to carry out the illegal acts that the plaintiff claims they carried out.

A corporation cannot conspire with its own officers or employees, nor can a corporation's employees conspire among themselves. This is because a corporation, its offi-

cers, and [2459] employees are so closely related that they are deemed to share a common purpose and are considered to be one actor. As I told you, a single actor cannot violate this part of the Sherman Act.

For similar reasons, a corporation cannot conspire with its wholly owned subsidiary. Like a corporation and its employees, a corporation and its wholly owned subsidiary share the same purpose and are therefore one actor. What that means is this: Is that there cannot be a conspiracy between Washington Mills and John Williams and Peter Williams or between Peter Williams and John Williams or between John Williams and Washington Mills. They are all the same corporation.

In this case, the conspiracy alleged and the conspiracy that must be proved by a preponderance of the evidence is a conspiracy between Washington Mills and BCS. That's the corporation—that's the conspiracy alleged in this case, and if there is a conspiracy which will allow this plaintiff to recover, it must be that conspiracy.

Now, in order to prove a conspiracy, it is not necessary for the plaintiff to present direct proof of oral or written agreements. Very often in cases like this such evidence is not available. You may find that the required conspiracy existed from the course of dealings among the 25 defendants and others through the words they exchange or from [2460] their acts alone.

What the plaintiff must prove by a preponderance of the evidence is that the members of the conspiracy in some manner came to a mutual understanding to accomplish or try to accomplish a common and unlawful objective, that is, to fix prices or try to fix prices. The plaintiff does not have to show that all of the means or methods which were agreed to accomplish this goal were actually used, nor does the plaintiff have to show that all of the persons alleged to have been members of the claimed conspiracy were, in fact, members.

What the plaintiff must prove is that the claimed conspiracy was knowingly formed, that is, it was formed with the intent to accomplish by joint action price fixing, that Washington Mills and BCS were knowingly members of that conspiracy.

Your determination whether Washington Mills and BCS knowingly joined the conspiracy must be based upon their individual actions. The membership of each party in a conspiracy must be established by evidence of its own conduct, not what is said or done by another party.

Whenever it appears from a preponderance of the evidence in the case that a conspiracy existed and that a defendant was a member of that—was one of the members of the conspiracy, then the statements made and the acts by any person likewise found to have been a member may be considered [2461] by you as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendants, provided such statements and acts were knowingly made and done during the continuance of the conspiracy and in furtherance of some object or purpose of the conspiracy.

What that means is this: Is if you find that there was a conspiracy and that Washington Mills and BCS were members of the conspiracy, from the time they both became a member of the conspiracy, each is responsible for the acts and sayings of the other. It's sort of a partnership, and in a partnership all partners are responsible for what other partners say and do during the furtherance of the objects of that partnership.

So here if you find that Washington Mills and BCS are part of a conspiracy, then each is responsible for what the other does in carrying out or in furtherance of that conspiracy. Any admission or statement made or act done outside of court by one person may not be considered as evidence against any other person who was not present

and heard the statement made or seen the act done unless there was a conspiracy.

In determining whether the plaintiff has proved the first element, namely, that a conspiracy existed, of which BCS and Washington Mills were members, you should first determine, [2462] according to the instructions I have given you, whether a conspiracy existed. If you conclude that a conspiracy did not exist, you should stop considering the Sherman antitrust claim because DeLong cannot recover on that claim if there is no conspiracy.

On the other hand, if you conclude that a conspiracy existed, you should next determine whether each, if Washington Mills was a knowing member of the conspiracy and whether BCS was a knowing member of the conspiracy. In order to find that a party joined the conspiracy, you must find that it participated in the conspiracy, and it did so with knowledge of at least some of the conspiracies unlawful purpose. A party may become a member of a conspiracy without full knowledge of all of the details of the conspiracy, and it is not necessary that a defendant be fully informed as to all the details of the conspiracy or its scope in order to be a member.

However, a party who has no knowledge of a conspiracy but who happens to act in a way which furthers some object or purpose of the conspiracy is not a member of the conspiracy. Likewise, knowledge of the existence of a conspiracy without participation in the conspiracy is also insufficient to make a party a member of a conspiracy. The acts done by one or more of the parties named as conspirators in this case were lawful acts if not done as a result of and [2463] pursuant to a conspiracy.

In determining whether or not a conspiracy existed as alleged by DeLong to fix the price of media sold to DeLong you may consider the validity of the reasons which such parties have ascribed for setting the price of the media. If those reasons seem to you to be not the real reason for setting the price, then these are circumstances

which you may take into consideration in determining whether the price set for the media was the result of and in pursuance of a conspiracy to fix the price of media sold to DeLong. On the other hand, these acts may appear to you to be reasonably responsive to business considerations and not in pursuance of a conspiracy.

The question, then, is what the intent was of the parties named as conspirators and whether they acted pursuant to a conspiracy to fix the price of media sold to DeLong.

Now, if you find that a conspiracy existed, then you must consider the second element of the price fixing charge, namely, whether the purpose or predictable effect of the agreement was to fix the price of media sold to DeLong.

In considering whether plaintiff has met this burden, you should bear in mind that the antitrust laws are concerned with substance rather than form. The plaintiff does not have to show that the agreement, if there was an agreement, explicitly fixed prices. What the plaintiff must [2464] show is that given the context in which the agreement was made and its relationship to the pricing process, the agreement had the purpose or predictable effect of fixing prices. Any agreement having the purpose or predictable effect of fixing prices is automatically unlawful under the antitrust laws.

The third element the plaintiff must prove by a preponderance of the evidence is that the restraint of trade complained of involved interstate commerce. The parties have stipulated that everyone involved here was engaged in interstate commerce, that is, commerce between different states. Therefore, no further proof of this element is required.

Now, if you find the plaintiff has met its burden on the first three elements of the claim as I have described them to you, then you must finally decide whether the

plaintiff has been injured. The plaintiff must prove by a preponderance of the evidence that it was injured in its business by the activity that are claimed to be unlawful. That is, the plaintiff must show that it was injured because of the anti-competitive effects of the conspiracy among—between BCS and Washington Mills.

Standing alone, the fact that the defendants engaged in anti-competitive conduct, the fact that the plaintiff's business suffered, is not sufficient to show injury. The plaintiff must show that its busin ss suffered because of the [2465] unlawful activity of those named as conspirators. To show this, the plaintiff must show first that the conspiracy played a substantial part in bringing about or causing the injury and, second, that the injury was either a direct result of the unlawful activity or at least a predictable consequence of it.

There may, of course, be a number of causes for a particular injury. The defendants contend that any injury the plaintiff may have suffered was not caused by their activities. The plaintiff does not have to prove that the unlawful activity of the defendants—that the defendants allegedly engaged in was the sole cause of its injury.

The plaintiff meets its burden if it shows that the defendants' unlawful acts substantially contributed to its injury, even though other factors may have contributed significantly. The plaintiff is not required to show that defendants acts were a greater cause of the injury than other factors.

Now, the plaintiff is alleging in this case that there was a conspiracy between Washington Mills and BCS, and you can readily see that BCS has not been in this trial as a defendant. It is not necessary for DeLong to join as defendant in this case all persons who may have participated with these named defendants in the alleged combination or conspiracy. A person injured by such a conspiracy may recover against one or all of those participating, and he may enforce [2466] his right of recovery

against one or some or all at his election, so you're hereby instructed that it is immaterial as a matter of law that any other members of the conspiracy may not have been joined in this suit by DeLong.

However, any judgment rendered in this case against the defendants could not be enforced against BCS because it is not named as a party in this action. * * *

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